Supreme Court, U.S.
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No. _____

In the
Supreme Court of the United States

JOE C. ROWE and wife, SHARON B. ROWE, and
HOWARD L. PRUITT, JR. and wife, GEORGIA PRUITT,

Petitioners,

v.

NORTH CAROLINA DEPARTMENT
OF TRANSPORTATION,

Respondent.

On Petition for Writ of Certiorari to the Supreme Court of North Carolina

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether, in awarding just compensation for the taking of a partial tract of property, the Fifth Amendment allows a court to reduce the award by the value of the *general* benefits said to accrue to the remainder of the tract as a result of the taking.

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PETITION FOR WRIT OF CERTIORARI

Joe C. Rowe, Sharon B. Rowe, Howard L. Pruitt, Jr., and Georgia Pruitt respectfully petition for a writ of certiorari to review the judgment of the Supreme Court of North Carolina.

OPINIONS BELOW

The opinion of the North Carolina Supreme Court is reported at 549 S.E.2d 203 (N.C. 2001); it appears at Appendix A to the petition. The opinion of the North Carolina Court of Appeals is reported at 531 S.E.2d 836 (N.C. Ct. App. 2000); it appears at Appendix B to the petition.

JURISDICTION

The judgment of the Supreme Court of North Carolina was entered on July 20, 2001. Petition Appendix (Pet. App.) at A-1. On October 1, 2001, the Chief Justice granted petitioners' application to extend the time in which to file the petition to and including November 16, 2001. *See* No. 01A288. This Court has jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS AT ISSUE

The Fifth Amendment to the United States Constitution provides in pertinent part: "nor shall private property be taken for public use, without just compensation."

Section 1 of the Fourteenth Amendment to the United States Constitution provides in pertinent part: "nor shall any State deprive any person of life, liberty, or property, without due process of law."

North Carolina General Statutes § 136-112 provides in pertinent part:

> The following shall be the measure of damages to be followed by the commissioners, jury or judge who determines the issue of damages:
>
> (1) Where only a part of a tract is taken, the measure of damages for said taking shall be the difference between the fair market value of the entire tract immediately prior to said taking and the fair market value of the remainder immediately after said taking, with consideration being given to any special or general benefits resulting from the utilization of the part taken for highway purposes.

STATEMENT OF THE CASE

The facts of this case are extremely simple. To construct a road that would connect two highways in Catawba County, North Carolina, respondent brought this condemnation action in state court in 1995, seeking to condemn 11.411 acres of an 18.123-acre tract owned by petitioners. Among other things, respondent's complaint prayed that "just compensation for the [taking] herein set forth be determined according to the provisions and procedures contained in Article 9 of Chapter 136 of the General Statutes." Complaint (filed June 26, 1995). Those provisions include Section 136-112(1) (quoted above), which provides that where (as here) only a part of a tract is taken, the measure of just compensation is the difference between the fair market value of the entire tract immediately prior to the taking and the fair market value of the remainder immediately after the taking—"with consideration being given to any special or *general benefits* resulting from the utilization of the part taken for highway purposes" (emphasis added).

Petitioners' answer challenged Section 136-112(1) as unconstitutional: among other things, the statute "denies [them] just compensation for the taking of their property and therefore is . . . in violation of Amendment V . . . and Amendment XIV . . . of the Constitution of the United States." Answer, Motions and Counterclaim at 1 (filed May 17, 1996). The trial court rejected this federal constitutional challenge and instructed the jury in accordance with the statute. The jury rendered a verdict that petitioners were not entitled to *any* financial compensation whatsoever for the taking of their 11.411 acres. As the North Carolina Supreme Court observed: "The verdict reflected that the jury agreed with [respondent's] argument that the 'general benefits' to [petitioners'] remaining property from the project exceeded the cost of the loss of acreage." Pet. App. at A–2.

Petitioners renewed their constitutional challenge in the North Carolina Court of Appeals. After the case went up and down on procedural issues, *see* 505 S.E.2d 911 (N.C. Ct. App. 1998), *rev'd*, 521 S.E.2d 707 (N.C. 1999), the appellate court ruled in petitioners' favor. The court held that "a statute, such as [Section] 136-112(1), allowing *general* benefits to be used as a setoff is unconstitutional," as it violates "the constitutional requirement of providing just compensation in condemnation proceedings." Pet. App. at B–18. The North Carolina Supreme Court reversed in turn:

> Because [Section 136-112(1)] allows a jury to consider "general benefits," the Court of Appeals held that it "allows a compensation which is unjust to the condemnee." [Pet. App. at B–18.]
>
> We disagree. The Fifth Amendment to the United States Constitution clearly allows Congress to empower the fact-finder to consider "general benefits." *McCoy v. Union Elevated R.R. Co.*, 247 U.S. 354, 366 . . . (1918).

Pet. App. at A–8.

From this ruling interpreting the Fifth Amendment's Just Compensation Clause, petitioners timely file their petition for certiorari.

REASONS FOR GRANTING THE WRIT

As set forth below, the decision of the Supreme Court of North Carolina conflicts with numerous decisions of state and federal appellate courts. Moreover, the lower court's error in applying federal just compensation law is sufficiently demonstrable as to make it a serious candidate for summary reversal.

I

WHETHER JUST COMPENSATION FOR PROPERTY ACTUALLY TAKEN FOR PUBLIC USE MAY BE REDUCED BY THE VALUE OF "*GENERAL* BENEFITS" IS AN IMPORTANT AND RECURRING QUESTION OF TAKINGS LAW ON WHICH THE LOWER COURTS ARE IN SHARP CONFLICT WITH EACH OTHER

When government takes private property for public use, the Fifth Amendment (made applicable to state agencies like respondent through the Fourteenth Amendment) mandates that the expropriated owners receive "just compensation." As this Court has stated, "[s]uch compensation means the full and perfect equivalent in money of the property taken." *United States v. Miller*, 317 U.S. 369, 373 (1943). That is, "[t]he owner is to be put in as good position pecuniarily as he would have occupied if his property had not been taken." *Id.* Thus, where an entire tract is taken, just compensation is "normally measured by [the tract's] fair market value." *United States v. 50 Acres of Land*, 469 U.S. 24, 25 (1984) (citing *Miller*).

Sometimes matters are more complicated. Where, as in the present case, "only a portion of a single tract is taken, the owner's compensation for that taking includes any element of

value arising out of the relation of the part taken to the entire tract. Such damage is often, though somewhat loosely, spoken of as severance damage." *Miller*, 317 U.S. at 376 (footnote omitted). Moreover—and more germane to the present case—"if the [partial] taking has in fact benefited the remainder, the benefit may be set off against the value of the land taken." *Id.*

In applying this "setoff" rule identified in *Miller*, courts consistently distinguish between two types of benefits that may accrue to the property owner's remaining land: "general" and "special." As the court below explained, *general benefits* are defined as increases in the value of property that "result from the enjoyment of the facilities provided by the new public work and from the increased general prosperity resulting from such enjoyment." Pet. App. at A–7. Examples of general benefits include "the rise in property value due to increased traffic flow, an aesthetic upgrading of a neighborhood, or more convenient parking." *Id.* By contrast, *special benefits* are increases in the value of land that "arise from the peculiar relation of the land in question to the public improvement"—for example, "the rise in property value due to newly acquired frontage on a public street." *Id.*[1]

It is universally agreed that the Fifth Amendment permits (though it does not require) the government to set off *special* benefits in awarding compensation for partial physical takings. The question presented by this case is whether that setoff may constitutionally also include *general* benefits—those that inure

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[1] These formulations are consistent with those of other courts and commentators. *See, e.g., Hendler v. United States*, 175 F.3d 1374, 1380 (Fed. Cir. 1999) ("[A]s a general matter, special benefits are those which inure specifically to the landowner who suffered the partial taking and are associated with the ownership of the remaining land. In contrast, benefits that inure to the community at large are considered general." (citation omitted)); 3 Julius L. Sackman et al., *Nichols on Eminent Domain* § 8A.02[4] (rev. 3d ed. 2001) (hereinafter *Nichols*).

to the community at large. Consistent with Section 136-112(1) of the General Statutes of North Carolina, the Supreme Court of North Carolina answered that question in the affirmative: under the statute upheld by the court below, it is perfectly plain that compensation for partial takings of private property must be reduced by the value of general as well as special benefits resulting from such takings.

The law is the same in at least two other states. Like its sister state, South Carolina recognizes no distinction between kinds of benefits in reducing compensation for partial takings. *See, e.g., Bramlett v. City Council of Greenville*, 70 S.E. 450, 452 (S.C. 1911) (approvingly citing antebellum decision holding that "when the benefits accruing to the landowner were to be taken into account in awarding damages to an owner for the taking of his land, all benefits, *general as well as special*, were to be estimated" (emphasis added)); *Smith v. City of Greenville*, 92 S.E.2d 639, 644-46 (S.C. 1956) (adhering to *Bramlett*). In addition, New Mexico law has long prescribed that where part of a tract is taken, "benefits, both general and special, should be set off against damages to the remainder and against the part taken." *Board of Commissioners v. Gardner*, 260 P.2d 682, 684 (N.M. 1953).

Arrayed against these three jurisdictions, however, is the overwhelming weight of authority, both federal and state. *See* 3 *Nichols*, *supra* note 1, § 8A.02[6] ("[T]he Supreme Court of the United States and a majority of other jurisdictions have held that only special benefits may be constitutionally setoff." (footnote omitted)). In the federal courts of appeals, "it is . . . the law that only 'special' benefits can be deducted from any compensation due; 'general' benefits cannot be deducted." *Hendler v. United States*, 175 F.3d 1374, 1380 (Fed. Cir. 1999); *accord, e.g., 6816.5 Acres of Land v. United States*, 411 F.2d 834, 837 (10th Cir. 1969) ("The benefits [to the remainder] that arise in these situations have been characterized by the courts as 'direct,' 'indirect,' 'general,' and 'special,' with only 'direct' and

'special' being allowed as a set off."); *United States v. Trout*, 386 F.2d 216, 221 (5th Cir. 1967) ("Special benefits [are to be] distinguished from general benefits which do not offset recovery . . . .").

In addition to the federal appellate courts, numerous state courts of last resort have issued decisions in conflict with the decision below. For example:

> In Delaware, both the value of the taken property and any damages to the remaining land may be reduced by the benefits to the landowner. This set off rule is inherent in the constitutional requirement of just compensation. However, such a reduction is permissible only with respect to special benefits accruing to the remaining land. *General benefits, i.e., benefits accruing to the entire community by reason of the improprieties* [sic] *contemplated by the taking, may not be set off.*

Acierno v. State, 643 A.2d 1328, 1332 (Del. 1994) (citations omitted and emphasis added). Likewise in Minnesota:

> [W]hen part of a tract is taken the owner is entitled to the difference between the market value of the tract immediately before the taking and the market value of what is left after the taking, *excluding from consideration general benefits* and deducting from the difference special benefits.

State ex rel. Lord v. Hayden Miller Co., 116 N.W.2d 535, 537 (Minn. 1962) (emphasis added); *see also Caponi v. Carlson*, 392 N.W.2d 591, 596 (Minn. Ct. App. 1986) (holding that "the city took Caponi's property without compensation in violation of U.S. Const. amend. V" and affirming that in such cases, "the owner is entitled to the difference in market value immediately before the taking and the market value of the remaining tract after the taking, excluding from consideration general benefits

and deducting special benefits"). Many other state courts are in accord.[2] Moreover, to the extent that state courts have not taken a position on the matter, it is because they employ a rule that is *more generous* to expropriated property owners: they

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[2] *See, e.g., Lazenby v. Arkansas State Highway Commission*, 331 S.W.2d 705, 708 (Ark. 1960) ("[T]he benefits which are deductible [against just compensation] are the benefits which are peculiar and special to the land involved."); *E-470 Public Highway Authority v. 455 Co.*, 3 P.3d 18, 23 (Colo. 2000) ("When a portion of a tract or parcel of land is taken for highway acquisition, the compensation for the property taken and damages to the residue shall be reduced by the amount of any special benefits which result from the improvement or project . . . ."); *State ex rel. Attorney General v. Midkiff*, 516 P.2d 1250, 1254-55 (Haw. 1973) ("Clearly, a method of valuation that does not distinguish between special and general benefits does not meet the test of fairness that is fundamental to a determination of just compensation," as only the former may "be used as an offset to the value of the property taken."); *City of Wichita v. May's Co.*, 510 P.2d 184, 188 (Kan. 1973) ("[S]pecial benefits to the remaining land may be deducted from an award of compensation, but general benefits may not."); *State ex rel. State Highway Commission v. Tate*, 592 S.W.2d 777, 778 (Mo. 1980) ("It is well-settled in Missouri that special benefits to the residue of a landowner's property may be set off against the award of compensation for a taking in a condemnation suit, but general benefits may not be set off."); *State v. Templeman*, 693 P.2d 125, 127 (Wash. Ct. App. 1984) ("just compensation in an eminent domain action [is] compensation for the land taken plus any injury to the remaining land, after offsetting against such award any special benefits accruing to the remainder by reason of the State's use of the land taken"); *Red Top Farms v. State Department of Transportation*, 503 N.W.2d 354, 356 (Wis. Ct. App. 1993) (observing that Wisconsin law "permits setoffs only for 'special' benefits, not for all benefits resulting in appreciation in the land remaining following eminent domain proceedings"); *State Highway Commission v. Rollins*, 471 P.2d 324, 329 (Wyo. 1970) ("The prevailing rule today, . . . whether by statute or otherwise, is to limit the setoff to special benefits.").

allow *no* deduction of benefits (general or special) for property that is actually taken.[3]

The importance of this issue cannot be gainsaid. Though questions of "takings" garner the most attention in the interpretation of the Just Compensation Clause, in "the overwhelming majority of real-world applications of the Clause, these weighty questions of law simply do not arise." Grant, *A Revolutionary View of the Seventh Amendment and the Just Compensation Clause*, 91 Nw. U. L. Rev. 144, 147 (1996). That is because a very high percentage of the cases that implicate the Clause are

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[3] *See, e.g., State v. Lewis*, 785 P.2d 24, 27 n.3 (Alaska 1990) ("A special benefit will not reduce the amount the owner is entitled to recover for the property actually taken."); *State ex rel. Miller v. Filler*, 812 P.2d 620, 622-23 (Ariz. 1991) (holding that severance damages, but not compensation for property actually taken, "are offset by any special benefits the remaining property receives because of the proposed improvement"); *Louisiana Power & Light Co. v. Lasseigne*, 240 So. 2d 707, 710 (La. 1970) (reiterating the rule that "benefits . . . may be set off from the damages to the remaining land, but not from the value of land taken"); *Frank v. State Department of Roads*, 127 N.W.2d 300, 303 (Neb.), *reh'g denied*, 129 N.W.2d 522 (Neb. 1964) ("The measure of damages for property taken for public use is the fair and reasonable value of the property actually appropriated and the difference in the fair and reasonable market value of the remainder of the property before and after the taking."); *State Highway Commission v. Bailey*, 319 P.2d 906, 914 (Or. 1957) ("It is now firmly established by our decisions that [special] benefits may be set off or employed to reduce the damages to the remainder of the tract not taken, but cannot be used to adversely affect the right of the owner to receive the fair cash market value of the land actually taken."); *Capital Properties v. State*, 636 A.2d 319, 323 (R.I. 1994) (holding that special benefits may offset severance damages but "the state may not offset any excess special benefits to the remainder against the value of the part taken"); *State v. Schmidt*, 867 S.W.2d 769, 779-80 (Tex. 1993) (construing condemnation statute allowing "peculiar" benefits to be set off against severance damages but not against the value of property taken), *cert. denied*, 512 U.S. 1236 (1994).

condemnation cases, and the "only issue at trial in most [such] proceedings is the amount of compensation due the property owner." *Id.* It is reasonable to conclude that the determination of such amount will entail a setoff of benefits in a significant percentage of cases.[4] Moreover, though the rules about which benefits may be set off against the value of the land taken are usually of ancient vintage, they are applied frequently to this day. *See, e.g., Frontage Development Corp. v. City of Boston*, No. 98-0629-C, 2001 Mass. Super. LEXIS 149, at *9 (May 4, 2001); *County of Hennepin v. Lurton*, No. C8-00-1157, 2001 Minn. App. LEXIS 359, at *2 (Apr. 10, 2001); *City of Branson v. Estate of Lafavre*, 9 S.W.3d 755, 758 (Mo. Ct. App. 2000).

Not only does the issue arise with continuing regularity, the choice of rules can have dramatic effects on the outcomes of cases. Indeed, where courts set off general as well as special benefits against awards for property actually taken, the Fifth Amendment guarantee of "just" compensation is often transformed into a rule of *no* compensation. In the present case, for instance, respondent was permitted to take 11.4 acres of petitioners' land for no compensation at all. Essentially the same result obtained in two cases showing that South Carolina and New Mexico have the same rule as North Carolina. *See Smith*, 92 S.E.2d at 641, 646 (city was allowed to take a half-acre of

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[4] One can infer this conclusion from the fact (a) that "[t]he primary object for the exercise of eminent domain in any community is the establishment of roads," 1 *Nichols*, *supra* note 1, § 1.22[1]; (b) that condemnation of property for roads and highways by nature generates partial takings in many if not most circumstances (typically for frontage), *see supra* notes 2-3 (listing numerous partial takings cases initiated by highway departments); and (c) that the building or widening of roads is one of the quintessential activities that generate the benefits, both special and general, that can conceivably be set off against the actual value of the land taken, *see, e.g.*, Pet. App. at A–7 (identifying "increased traffic flow" and "newly acquired frontage" as examples of general and special benefits, respectively).

improved land for no compensation at all); *Gardner*, 260 P.2d at 686 (county could have taken 88.8 acres for no compensation at all, had it preserved the point for appeal).

For all these reasons, it is manifest that the North Carolina Supreme Court has decided an important question of constitutional law in a manner that conflicts with the decisions of other state courts of last resorts and of the federal courts of appeals. A grant of certiorari is warranted under Rule 10(b).

II

THE LOWER COURT'S DEMONSTRABLY ERRONEOUS APPLICATION OF FEDERAL LAW WARRANTS SUMMARY REVERSAL

Although a tool that is employed infrequently, summary reversal is available to "correct[] a lower court's demonstrably erroneous application of federal law." *Maryland v. Dyson*, 527 U.S. 465, 467 n.1 (1999). Petitioners respectfully submit that the decision below qualifies for such treatment.

First, the decision is manifestly contrary to the uniform rule in the federal courts, a rule that derives directly from this Court's decision in *Bauman v. Ross*, 167 U.S. 548, 574 (1897). *See, e.g., Hendler*, 175 F.3d at 1379 (citing *Bauman*); *6816.5 Acres of Land*, 411 F.2d at 837 n.1 (same); *Trout*, 386 F.2d at 221 (same). *Bauman* itself held that "when part only of a parcel of land is taken for a highway," and when "the part which [the owner] retains is *specially and directly* increased in value by the public improvement, the damages to the whole parcel by the appropriation of part of it are lessened" thereby. 167 U.S. at 574 (emphasis added).[5] This Court has never deviated from

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[5] In the course of justifying this rule as the correct measurement of the "just compensation required by the Constitution," *id.*, the Court observed that "[i]n New York, the courts have gone *beyond this* in allowing benefits to be taken into consideration." *Id.* at 577 (emphasis added). (continued...)

Bauman's holding that only "special[] and direct[]" benefits may be set off.

Second, the Supreme Court of North Carolina stumbled badly in claiming to the contrary. Asserting that "[i]t is clear that the Fourteenth Amendment to the United States Constitution allows states to empower fact-finders to consider 'general benefits' when calculating just compensation," the court below quoted from this Court's decision in *McCoy v. Union Elevated Railroad Co.*, 247 U.S. 354, 366 (1918):

> [W]e are unable to say that [a landowner] suffers deprivation of any fundamental right when a state . . . permits consideration of the actual benefits—enhancement in market value—flowing directly from a public work, although all in the neighborhood receive like advantages [i.e., the benefits are general].

Pet. App. at A–8.

This quotation, while superficially supportive of the rule followed by the court below, is extremely misleading. *McCoy* was a common-law action brought in the courts of Illinois "for an alleged damage to the property of plaintiff arising from the construction [maintenance and operation] of the structure in the abutting street for elevated railroad purposes." 247 U.S. at 358. Although the plaintiff invoked that state's analogue to the Just Compensation Clause, there was a crucial difference between the Fifth Amendment and the Illinois constitution at the time. The latter provided that "private property shall not be taken *or damaged* for public use without just compensation." 247 U.S. at 363 (emphasis added). Because the elevated railroad (Chicago's famous Loop "L") was constructed entirely on

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[5] (...continued)
sis added). How so? Under that state's constitution, "*both special and general benefits* from the laying out of a street may be set off against the value of the part taken." *Id.* at 578 (emphasis added).

public property, the plaintiff's claim was not for a taking but for a "damaging": "And here it must be noted that the claim is for damages to property *not actually taken* from the owner's dominion." *Id.* (emphasis added); *accord id.* at 364 (quoting the state supreme court as referring "land not taken," to "lands not taken," and twice to "property not taken"). In other words, *McCoy* was not even a takings case!

Moreover, in explaining why it was sustaining the Illinois rule that permitted general benefits to be offset in determining whether property was "damaged" in a constitutional sense, the Court reiterated that such rule governed what allowance should be made for benefits "in arriving at the amount of damage to *property not taken*." *Id.* at 366 (emphasis added). Here, then, is the larger passage from which the Supreme Court of North Carolina quoted only the middle sentence:

> It is almost universally held that in arriving at the amount of damage to property not taken allowance should be made for peculiar and individual benefits conferred upon it—compensation to the owner in that form is permissible. And we are unable to say that he suffers deprivation of any fundamental right when a State goes one step further and permits consideration of actual benefits—enhancement in market value—flowing directly from a public work, although all in the neighborhood receive like advantages. In such case the owner really loses nothing which he had before; and it may be said with reason, there has been no real injury.

Id. Consequently, where (as here) property *is* actually taken, *McCoy* provides no basis whatsoever for abandoning—or even questioning—the prevailing federal rule that "only 'special' benefits can be deducted from any compensation due; 'general' benefits cannot be deducted." *Hendler*, 175 F.3d at 1380.

Third, the prevailing federal rule—the rule rejected by the Supreme Court of North Carolina in this case—closely comports with the purpose of the Fifth Amendment's guarantee of "just compensation." In giving content to this guarantee, "this Court has sought to put the owner of condemned property 'in as good a position pecuniarily as if his property had not been taken.'" *United States v. 564.54 Acres of Land*, 441 U.S. 506, 510 (1979) (quoting *Olson v. United States*, 292 U.S. 246, 255 (1934)); *see also, e.g., 50 Acres of Land*, 469 U.S. at 30 (referring to "the basic principles of indemnity embodied in the Just Compensation Clause"). A rule that allows the setoff of special benefits does just this; a rule that also allows the setoff of general benefits does not. The argument is very simple:

> General benefits may not be used to offset damages because the owner whose land is taken would be placed in a worse position than his neighbor whose estate lies outside the path of the improvement and who shares in the increased value without any pecuniary loss. Arguably, the setoff of general benefits denies the condemnee the constitutional guarantee of just compensation since he is singled out and deprived of a share in the increased prosperity of his fellow citizens merely because the public happens to want a portion of his land. The condemnee pays in taxation for his share of general benefits, just as other members of the public, and therefore, is entitled to receive his fair portion of the general advantages brought about by a public improvement.

3 *Nichols*, *supra* note 1, § 8A.02[6]. As the Supreme Court of Hawaii put the point, "it is unfair for a land owner to be taxed specially through the reduction or refusal of compensation by offsetting benefits which his neighbors, whose lands are not taken, nonetheless receive free of charge." *Midkiff*, 516 P.2d at 1255 (quoting *Territory ex rel. Sylva v. Mendonca*, 375 P.2d 6, 13 (Haw. 1962)).

In addition, the prevailing rule is supported by the consideration that "the landowner whose property is taken should not be forced to shoulder a *disproportionate burden* for the public project as compared to other neighboring landowners whose property was not taken but who share in the general benefits conferred by the project." 3 *Nichols*, *supra* note 1, § 8.02[1] (emphasis added). This consideration accords with the Court's oft-repeated pronouncement that the Just Compensation Clause embodies not only indemnity but also proportionality: the Fifth Amendment's guarantee is "designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Palazzolo v. Rhode Island*, 121 S. Ct. 2448, 2466 (2001) (quoting *Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 123-24 (1978) (quoting *Armstrong v. United States*, 364 U.S. 40, 49 (1960))).

Fourth, the arguments adduced against the prevailing rule are, to put it charitably, weak. The court below asserted that acceptance of the rule "would result in [petitioners] being fully compensated for the land lost *and* being additionally compensated for 'general benefits' accruing to their remainder and to the surrounding property owners." Pet. App. at A–11. This is just plain wrong. Consistent with this Court's decisions, petitioners ask to be "fully compensated" for the 11.4 acres taken, which necessarily includes "any element of value arising out of the relation of the part taken to the entire tract," or "severance damage." *Miller*, 317 U.S. at 376. Petitioners ask for *nothing more*; indeed, they concede they may even receive *less*, to the extent respondent can prove that their remaining land received *special* benefits. How this translates into what the court below labelled "additional[] compensation" is a mystery—unless the court thought it is "compensation" for landowners to receive, in equal share with their fellow citizens, the diffuse, indirect, and in-kind benefits of public programs for which they have paid or will pay in taxes or fees. But this has never been the law.

The arguments put forth by other courts are similarly bad. The Supreme Court of New Mexico gave two justifications for departing from the prevailing rule: "the policy of the state in trying to bring down excessive costs of rights-of-way so as to make the money appropriated and available for roads and other public improvements go as far as possible"; and the "gradually changing concept of the sacred character of real property ownership which thus gradually is altering the basic theory of 'just compensation' in condemnation cases." *Gardner*, 260 P.2d at 685. A policy to minimize the fiscal burden of public projects is all well and good, but when that policy "comes into conflict with the superior authority of [the] Constitution," it necessarily must yield. *Ex parte Young*, 209 U.S. 123, 160 (1908). As the Court has made quite clear, considerations like "the inhibiting financial force which inheres in the" payment of just compensation must bow to the canon that once there has been a taking of private property, such payment is a "constitutional obligation." *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304, 315, 317 (1987).

As for the so-called "gradually changing concept" of real property that was said by the New Mexico court to be "altering the basic theory of 'just compensation,'" this Court apparently did not get the message. The "basic theory" of just compensation has not changed for at least a century. *Compare 50 Acres of Land*, 469 U.S. at 29 (1984) ("[J]ust compensation normally is to be measured by the market value of the property at the time of the taking contemporaneously paid in money."), *with Monongahela Navigation Co. v. United States*, 148 U.S. 312, 341 (1893) ("Such an appropriation cannot be had without just compensation; and that . . . demands payment of the value of the property as it stands at the time of taking."). If anything, this Court's recent jurisprudence has been *more* respectful of the guarantee of just compensation. *See, e.g., Dolan v. City of Tigard*, 512 U.S. 374, 392 (1994) ("We see no reason why the Takings Clause of the Fifth Amendment, as much a part of the

Bill of Rights as the First Amendment or Fourth Amendment, should be relegated to the status of a poor relation . . . .").

Finally, there are arguments like those advanced by the South Carolina Supreme Court in *Wilson v. Greenville County*, 96 S.E. 301 (S.C. 1918). That decision found "significant" the "marked difference" between two provisions of the state constitution, one of which mandated "just compensation" with no elaboration, while the other mandated "full compensation . . . irrespective of any benefit from any improvement proposed by [the condemnor]." *Id.* at 303. This difference, especially considered in light of the fact that prior to the state's constitution of 1868, "private property could be taken for a purely public purpose, such as a highway, without compensation" at all, led the court to conclude that "just compensation" did not preclude the setoff of proposed "improvements," i.e., benefits. *Id.* We recount what is otherwise doubtless a historical curiosity only to demonstrate how utterly irrelevant it is for interpreting the federal Just Compensation Clause.

Wilson is relevant in one respect, however. In closing its opinion, the South Carolina court had this to say regarding the split that is described in the present petition:

> While the decisions of the Courts of the different States, construing practically the same constitutional provisions, are conflicting, yet, as Mr. Lewis, in [2 *Lewis on Eminent Domain* § 471 (3d ed. 1909)], says, "there can be but one absolutely correct rule" . . . . It is the rule adopted by the Supreme Court of the United States and a majority of the States, and it has the approval of the most eminent text writers. *Bauman v. Ross*, 167 U.S. 548 [1897] . . . .

96 S.E. at 304. Although it got the rule exactly backwards, the court can at least be credited with recognizing that there can be but one "absolutely correct rule," namely, the rule set forth by this Court in *Bauman v. Ross* and adhered to uniformly by the

federal courts of appeals and by most state courts of last resort. In departing from that rule to hold that *general* benefits can be set off against the award of just compensation for the taking of a partial tract of property, the North Carolina Supreme Court effected a demonstrably erroneous application of federal law that warrants summary reversal, if not plenary review.

CONCLUSION

The petition for writ of certiorari should be granted.

DATED: November, 2001.

Respectfully submitted,

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APPENDIX

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(July 20, 2001)

B. Opinion of the Court of Appeals of North Carolina
(June 20, 2000)

Appendix A–1

IN THE SUPREME COURT OF NORTH CAROLINA

No. 506A98-2

FILED: 20 JULY 2001

DEPARTMENT OF TRANSPORTATION

v.

JOE C. ROWE and wife, SHARON B. ROWE; HOWARD L. PRUITT, JR. and wife, GEORGIA PRUITT; ROBERT W. ADAMS, trustee; ALINE D. BOWMAN; FRANCES BOWMAN BOLLINGER; LOIS BOWMAN MOOSE; DOROTHY BOWMAN ABERNETHY and husband, KENNETH H. ABERNETHY; MARTHA BOWMAN CAUDILL and husband, JACK CAUDILL; APPALACHIAN OUTDOOR ADVERTISING CO., INC. (formerly Appalachian Poster Advertising Company, Inc.), Lessee; and FLORENCE BOWMAN BOLICK

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 138 N.C. App. 329, 531 S.E.2d 836 (2000), on remand from this Court, 351 N.C. 172, 521 S.E.2d 707 (1999), finding error in orders entered 8 May 1997 and 16 May 1997 by Baker, J., and in a judgment entered 17 June 1997 by Hyatt, J., in Superior Court, Catawba County, and ordering a new trial. Heard in the Supreme Court 12 February 2001.

Roy A. Cooper, Attorney General, by J. Bruce McKinney, Assistant Attorney General, and T. Lane Mallonee and W. Richard Moore, Special Deputy Attorneys General, for plaintiff-appellant.

Lewis & Daggett, Attorneys at Law, P.A., by Michael J. Lewis; and Bell, Davis & Pitt, P.A., by Stephen M. Russell, for defendant-appellees.

ORR, Justice.

This dispute arose from the North Carolina Department of Transportation's ("DOT") decision to build a road connecting U.S. Highway 70-321 to an interchange on Interstate 40 in Catawba County. To acquire land for this project, the DOT exercised its authority under N.C.G.S. § 136-18 to condemn 11.411 acres of defendants' 18.123-acre tract. As required by statute, the DOT acquired defendants' property by filing a declaration of taking and asking for a determination of just compensation. At trial, the presiding judge instructed the jury as to the requirements of N.C.G.S. § 136-112(1), which provides that just compensation is

> the difference between the fair market value of the entire tract immediately prior to said taking and the fair market value of the remainder immediately after said taking with consideration being given to any special or general benefits resulting from the utilization of the part taken for highway purposes.

N.C.G.S. § 136-112(1) (1999). The jury rendered a verdict that defendants were not entitled to any financial compensation for the taking. The verdict reflected that the jury agreed with DOT's argument that the "general benefits" to defendants' remaining property from the project exceeded the cost of the loss of acreage. The trial court entered judgment consistent with this verdict, and the defendants appealed.

After reviewing the errors alleged by defendants, the Court of Appeals, *inter alia*, ordered a new trial, on two grounds. First, the Court of Appeals held that N.C.G.S. § 136-112(1) violated the Law of the Land Clause of the North Carolina Constitution. *Department of Transp. v. Rowe*, 138 N.C. App. 329, 342-43, 531 S.E.2d 836, 845 (2000). The Court of Appeals stated that "by allowing general benefits to [set off] the fair market value of the remaining land, the statute allows a compensation which is unjust to the condemnee." *Id.* at 342,

531 S.E.2d at 845. Second, the Court of Appeals held that the statute denied defendants equal protection of the law under the North Carolina Constitution. The Court of Appeals decision was based upon the different standards for compensation for condemnees set out in two different statutes. Defendants' compensation was determined under N.C.G.S. § 136-112(1) because the DOT condemned the property. However, owners of property condemned under N.C.G.S. § 40A would be entitled to compensation under N.C.G.S. § 40A-64(b), which provides for a compensation system more favorable to condemnees than the system provided for in N.C.G.S. § 136-112(1). The Court of Appeals reasoned that "[b]ecause there is no compelling governmental interest to support [the classes created by N.C.G.S. § 136-112(1) and N.C.G.S. § 40A-64(b)] a . . . property owner's equal protection rights are violated by allowing such a classification." *Id.* at 344, 531 S.E.2d at 846.

Judge Horton dissented on two grounds. He first contended that the Court of Appeals lacked jurisdiction to consider whether this statute violates the Law of the Land Clause of the North Carolina Constitution because defendants neither assigned error on those grounds nor argued that claim before the trial court. He also dissented on the grounds that N.C.G.S. § 136-112(1) does not violate North Carolina's Equal Protection Clause. We agree with Judge Horton on both grounds.

I.

We first conclude that the Court of Appeals erred because the question of whether this statute violates the Law of the Land Clause was not properly presented. As Judge Horton pointed out, Rule 10(c) of the North Carolina Rules of Appellate Procedure requires that an appellant state the legal basis for all assignments of error. N.C. R. App. P. 10(c). We have also held that arguments not made before the trial court are not properly before the Court of Appeals. *State v. King*, 342 N.C. 357, 364,

464 S.E.2d 288, 293 (1995). Here, defendants in their appeal to the Court of Appeals failed to assign error on the grounds that N.C.G.S. § 136-112(1) violates the Law of the Land Clause. Also, defendants did not argue to the trial court that the Law of the Land Clause was an independent reason to strike down the statute. Likewise, they did not even make this argument before the Court of Appeals. Even though defendants argued and assigned error to the effect that N.C.G.S. § 136-112(1) denied defendants equal protection under the law, they never raised the issue of a due process violation under our state Constitution's Law of the Land Clause. Thus, the Court of Appeals erred in considering the constitutionality of the statute on those grounds, and we disavow their reasoning and reverse their holding.

II.

We also agree with Judge Horton that N.C.G.S. § 136-112(1) did not deprive defendants the equal protection of the law, although we agree on different grounds from those stated in the dissent. Thus, for the reasons stated below, we reverse the Court of Appeals' holding that N.C.G.S. § 136-112(1) violates the Equal Protection Clause of the North Carolina Constitution. We also hold that it comports with the United States Constitution.

The Equal Protection Clause of Article I, Section 19 of the North Carolina Constitution and the Equal Protection Clause of Section 1 of the Fourteenth Amendment to the United States Constitution forbid North Carolina from denying any person the equal protection of the laws. N.C. Const. art. I, § 19 ("No person shall be denied the equal protection of the laws."); U.S. Const. amend. XIV, § 1 ("No State shall . . . deny to any person within its jurisdiction the equal protection of the laws."). To determine if a regulation violates either of these clauses, North Carolina courts apply the same test. *Duggins v. N.C. State Bd. of Certified Pub. Accountant Exam'rs*, 294 N.C. 120, 131, 240

S.E.2d 406, 413 (1978). The court must first determine which of several tiers of scrutiny should be utilized. Then it must determine whether the regulation meets the relevant standard of review. Strict scrutiny applies when a regulation classifies persons on the basis of certain designated suspect characteristics or when it infringes on the ability of some persons to exercise a fundamental right. *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 16-17, 36 L. Ed. 2d 16, 33 (1973); *Texfi Indus., Inc. v. City of Fayetteville*, 301 N.C. 1, 11, 269 S.E.2d 142, 149 (1980). If a regulation receives strict scrutiny, then the state must prove that the classification is necessary to advance a compelling government interest; otherwise, the statute is invalid. *San Antonio*, 411 U.S. at 16-17, 36 L. Ed. 2d at 33; *Texfi*, 301 N.C. at 11, 269 S.E.2d at 149. Other classifications, including gender and illegitimacy, trigger intermediate scrutiny, which requires the state to prove that the regulation is substantially related to an important government interest. *Clark v. Jeter*, 486 U.S. 456, 100 L. Ed. 2d 465 (1988); *Craig v. Boron*, 429 U.S. 190, 50 L. Ed. 2d 397 (1976). If a regulation draws any other classification, it receives only rational-basis scrutiny, and the party challenging the regulation must show that it bears no rational relationship to any legitimate government interest. If the party cannot so prove, the regulation is valid. *Nordlinger v. Hahn*, 505 U.S. 1, 10, 120 L. Ed. 2d 1, 12 (1992); *Texfi*, 301 N.C. at 11, 269 S.E.2d at 149.

In concluding that defendants were denied equal protection under N.C.G.S. § 136-112(1), the Court of Appeals applied strict scrutiny. *Rowe*, 138 N.C. App. at 344, 531 S.E.2d at 846. We conclude that it was error to do so. In fact, as explained below, N.C.G.S. § 136-112(1) does not trigger strict scrutiny because it neither classifies on the basis of a suspect classification nor infringes upon a fundamental right. Furthermore, N.C.G.S. § 136-112(1) satisfies rational-basis scrutiny because there are rational reasons for DOT and other

condemnors to use different systems to calculate just compensation.

A.

We begin our analysis by explaining why N.C.G.S. § 136-112(1) receives only rational-basis scrutiny. Strict scrutiny applies only when a regulation classifies persons on the basis of certain suspect characteristics or infringes the ability of some persons to exercise a fundamental right. *San Antonio*, 411 U.S. at 16-17, 36 L. Ed. 2d at 33; *Texfi*, 301 N.C. at 11, 269 S.E.2d at 149. Not even defendants contend that they are part of a suspect class deserving the extraordinary protection provided by strict scrutiny. They do, however, contend that N.C.G.S. § 136-112(1) infringes upon a fundamental right: the right to just compensation.

Defendants argue that the Court of Appeals correctly concluded that N.C.G.S. § 136-112(1) infringes upon a fundamental right. They claim that the statute violates their right to just compensation. We disagree. Just compensation is clearly a fundamental right under both the United States and North Carolina Constitution. It is specifically enumerated in the Fifth Amendment to the United States Constitution and has been applied to the states through the 14th. *Chicago, Burlington & Quincy R.R. Co. v. City of Chicago*, 166 U.S. 226, 239, 41 L. Ed. 979, 985 (1897). The right to just compensation is not expressly mentioned in the North Carolina Constitution, but "this Court has inferred such a provision as a fundamental right integral to the 'law of the land' clause." *Finch v. City of Durham*, 325 N.C. 352, 363, 384 S.E.2d 8, 14 (1989); *see also Eller v. Board of Educ. of Buncombe County*, 242 N.C. 584, 586, 89 S.E.2d 144, 146 (1955) ("When private property is taken for public use, just compensation must be paid . . . . While this principle is not stated in express terms in the North Carolina Constitution, it is regarded as an integral part of the 'law of the land' . . . .").

Since a fundamental right is involved, we must determine if that right is infringed upon by application of N.C.G.S. § 136-112(1). If defendants' right to just compensation is impacted by the statute, then that impact would warrant a review under the strict-scrutiny standard. If there is no infringement, then the rational-basis standard would apply.

The Court of Appeals held that defendants did not receive just compensation because the statute allows the jury to consider "general benefits" when it calculates just compensation for a partial taking. "General benefits" are defined as increases in the value of land "which arise from the fulfillment of the public object which justified the taking [and] which result from the enjoyment of the facilities provided by the new public work and from the increased general prosperity resulting from such enjoyment." *Kirkman v. State Highway Comm'n*, 257 N.C. 428, 434, 126 S.E.2d 107, 112 (1962) (citations omitted); *see also* 3 Julius L. Sackman, *Nichols on Eminent Domain* 8A.02[4][a] (rev. 3d ed. 2000). Examples include the rise in property value due to increased traffic flow, an aesthetic upgrading of a neighborhood, or more convenient parking. 3 *Nichols on Eminent Domain* § 8A.02[4][a]. In contrast, "special benefits" are increases in the value of land "which arise from the peculiar relation of the land in question to the public improvement." *Kirkman*, 257 N.C. at 433, 126 S.E.2d at 112; *see also* 3 *Nichols on Eminent Domain* § 8A.02[4][b]. An example is the rise in property value due to newly acquired frontage on a public street. 3 *Nichols on Eminent Domain* § 8A.02[4][b].

Both of these types of benefits may be considered by the jury when calculating just compensation under N.C.G.S. § 136-112(1). That statute provides that when, as here, only part of a tract is condemned for the construction of a highway, just compensation for the condemnation is

> the difference between the fair market value of the entire tract immediately prior to said taking and the fair market value of the remainder immediately after said taking with consideration given to any special or general benefits resulting from the utilization of the part taken for highway purposes.

N.C.G.S. § 136-112(1). Because this statute allows a jury to consider "general benefits," the Court of Appeals held that it "allows a compensation which is unjust to the condemnee." *Rowe*, 138 N.C. App. at 342, 531 S.E.2d at 845.

We disagree. The Fifth Amendment to the United States Constitution clearly allows Congress to empower the fact-finder to consider "general benefits." *McCoy v. Union Elevated R.R. Co.*, 247 U.S. 354, 366, 62 L. Ed. 1156, 1164 (1918). We are also convinced that the Law of the Land Clause of the North Carolina Constitution allows a jury to consider "general benefits" when it calculates just compensation. Allowing the jury to consider how "general benefits" affect the market value of the condemnee's remaining land is in accord with persuasive federal precedent, with the consistent practice of this Court, and with the purposes underlying the requirement of just compensation.

It is clear that the Fourteenth Amendment to the United States Constitution allows states to empower fact-finders to consider "general benefits" when calculating just compensation. The United States Supreme Court stated in *McCoy v. Union Elevated R.R. Co.* that

> we are unable to say that [a property owner] suffers deprivation of any fundamental right when a state . . . permits consideration of the actual benefits—enhancement in market value—flowing directly from a public work, although all in the neighborhood receive like advantages.

Id. at 366, 62 L. Ed. at 1166. This holding, however, was based on the Fourteenth Amendment to the United States Constitution, *id.* at 363, 62 L. Ed. at 1165, and although "[d]ecisions by the federal courts as to the construction and effect of the due process clause of the United States Constitution . . . do not control an interpretation by this Court of the law of the land clause of our state Constitution[, they] are . . . persuasive [authority]," *McNeill v. Harnett County*, 327 N.C. 552, 563, 398 S.E.2d 475, 481 (1990) (citations omitted). Even though this interpretation is only persuasive authority, we believe it correctly explains the requirements of just compensation.

This interpretation of just compensation accords with the long practice of our state. Although this Court has never specifically addressed the constitutionality of allowing the fact-finder to consider "general benefits," allowing fact-finders to do so has been the practice of this Court since at least 1893. *See, e.g., Robinson v. State Highway Comm'n*, 249 N.C. 120, 105 S.E.2d 287 (1958); *Proctor v. State Highway & Public Works Comm'n*, 230 N.C. 687, 55 S.E.2d 479 (1949); *Wade v. State Highway Comm'n*, 188 N.C. 210, 124 S.E. 193 (1924); *Miller v. City of Asheville*, 112 N.C. 759, 16 S.E. 762 (1893); *see also Department of Transp. v. Mahaffey*, 137 N.C. App. 511, 528 S.E.2d 381 (2000). In 1893 in *Miller v. City of Asheville*, this Court addressed a jury instruction issue arising out of the legislative change applying "special benefits" and "general benefits" in condemnation proceedings. While no constitutional issues were raised, Justice Clark stated for the Court:

> Whether the [condemning authority] can reduce damages by all the benefits accruing the [condemnee], rests with the sovereign when it confers the exercise of the right of eminent domain . . . . [Thus] the present act, which extends the assessment of benefits to all received by the

> landowner, instead of a restriction to the special benefits, is valid. All the landowner can claim is that his property shall not be taken for public use without compensation. Compensation is had when the balance is struck between the damages and benefits conferred on him by the act complained of. To that, and to that alone, he has a constitutional and vested right.

112 N.C. at 768, 16 S.E. at 764. This Court has also stated:

> It is firmly established in this State that "Where only a part of a tract of land is appropriated by the State Highway and Public Works Commission for highway purposes, the measure of damages in such proceeding is the difference between the fair market value of the entire tract immediately before the taking and the fair market value of what is left immediately after the taking . . . ." Proctor v. State Highway and Public Works Commission, 230 N.C. 687, 691, 55 S.E.2d 479, 482. This rule has been approved many times . . . .

Kirkman, 257 N.C. at 432-33, 126 S.E.2d at 111.

Allowing the fact-finder to consider "general benefits" follows not only persuasive authority and long practice, it also fulfills the purpose underlying the requirement of just compensation: to ensure that persons being required to provide land for public projects are put in the same financial position as prior to the taking. *Accord United States v. 50 Acres of Land*, 469 U.S. 24, 30, 83 L. Ed. 2d 376, 383 (1984) (referring to "the basic principles of indemnity embodied in the Just Compensation Clause"); *cf. State Highway Comm'n v. Phillips*, 267 N.C. 369, 374, 148 S.E.2d 282, 286 (1966) ("In condemnation proceedings our decisions are to the effect that damages are to be awarded to compensate for loss sustained by the landowner."). As the United States Supreme Court has

stated, a condemnee "is entitled to be put in as good a position pecuniarily as if his property has not been taken. He must be made whole but is not entitled to more." *Olson v. United States*, 292 U.S. 246, 255, 78 L. Ed. 1236, 1244 (1934).

Here, the argument of defendants, which was accepted by the Court of Appeals, would result in defendants being fully compensated for the land lost *and* being additionally compensated for "general benefits" accruing to their remainder and to the surrounding property owners. While defendants may deem the denial of such a result unfair, it in no way denies them just compensation. As noted by Justice Clark in *Miller*, the legislature has decided that the state can reduce damages by all of the benefits accruing and that decision rests with the legislature in conferring the right of eminent domain. *Miller*, 112 N.C. at 768, 16 S.E. at 764. Just compensation is had when the balance is struck between the damages and benefits conferred. "To that, and to that alone, [defendants have] a constitutional and vested right." *Id.* If defendants are dissatisfied with that result, then their recourse is with the legislature. Furthermore, because the Law of the Land Clause requires only that a condemnee be indemnified, it permits a fact-finder to consider "general benefits" accruing to a condemnee's remaining property. For the purposes of just compensation, damages are measured by the change in the fair market value of the land. *See* 26 Am. Jur. 2d *Eminent Domain* § 298 (1996); *accord Olson*, 292 U.S. at 257, 78 L. Ed. at 1244. A condemnee is thus indemnified if she receives the difference between the fair market value of her property before the condemnation and the fair market value of her remainder after the condemnation. That change in market value is clearly affected by "general benefits" accruing to her remaining property; a benefit is no less real simply because it is shared by a condemnee's neighbor. Therefore, because the Law of the Land Clause requires only that the state indemnify the condemnee, because a condemnee's loss is measured by the

change in the market value of her property, and because that market value is affected by "general benefits," the Law of the Land Clause allows a fact-finder to consider "general benefits" when calculating just compensation. It follows that N.C.G.S § 136-112(1) satisfies that clause. Because N.C.G.S. § 136-112(1) neither infringes defendants' right to just compensation nor classifies persons on the basis of a suspect characteristic it does not trigger strict scrutiny under the Equal Protection Clauses of the North Carolina or United States Constitution. Instead, that statute receives only rational-basis scrutiny.

B.

Defendants contend that N.C.G.S. § 136-112(1) fails rational-basis scrutiny. We disagree. Rational-basis scrutiny requires only that the classification made by the statute be rationally related to a legitimate government objective. *Nordlinger*, 505 U.S. at 10, 120 L. Ed. 2d at 12 ("[U]nless a classification warrants some form of heightened review . . . , the Equal Protection Clause requires only that the classification rationally further a legitimate state interest."); *Texfi*, 301 N.C. at 149, 269 S.E.2d at 149 ("[T]he lower tier of equal protection analysis . . . merely requires that distinctions which are drawn by a challenged statute or action bear some rational relationship to a conceivable legitimate government interest."). It gives wide latitude to the legislature; if there is any plausible policy reason for the classification, the test is satisfied. *Nordlinger*, 505 U.S. at 11, 120 L. Ed. 2d at 13 ("In general, the Equal Protection Clause is satisfied so long as there is a plausible policy reason for the classification . . . ."); *White v. Pate*, 308 N.C. 759, 766, 304 S.E.2d 199, 204 (1983) ("[I]n instances in which it is appropriate to apply the rational basis standard, the governmental act is entitled to a presumption of validity.").

In article 9, "Condemnation," of chapter 36 of the North Carolina General Statutes, the General Assembly has set out the

process for the acquisition of property by DOT using the power of eminent domain. Within that article is N.C.G.S. § 136-112, "Measure of Damages." That statute specifically sets out, as previously noted, that just compensation is determined by the fair market value of the property immediately before the taking and immediately after the taking with consideration given to "general benefits" and "special benefits." N.C.G.S. § 136-112(1).

In contrast, article 1 of chapter 40A of the North Carolina General Statutes provides that "[i]t is the intent of the General Assembly that the procedures provided by this Chapter shall be the exclusive condemnation procedures to be used in this State by all private condemners and all local public condemners." N.C.G.S. § 40A-1 (1999). The statute further provides for the repeal of all other provisions in laws, charters, or local acts authorizing different procedures. *Id.* It is obvious that in 1981 the General Assembly chose to consolidate and make uniform a myriad of laws pertaining to the exercise of eminent domain by public and private condemners.

Chapter 40A thus sets out both the procedure for calculation of just compensation, N.C.G.S. ch. 40A, art. 3, and the measure of just compensation, N.C.G.S. ch. 40A, art. 4, for landowners affected by the exercise of eminent domain. The statute covers: (a) "Private Condemners," such as corporations, boards of trustees, and railroads; (b) "Local Public Condemners," to include both municipalities and counties; and (c) "Other Public Condemners," such as hospital authorities, housing authorities, and watershed-improvement districts. Each section also lists with some specificity the types of public uses that these condemners can undertake through the use of eminent domain.

In determining just compensation for a taking by one of these local or private entities for any of the range of permissible purposes, the General Assembly opted to provide a measure of

just compensation for the affected property owners that ensures a choice in a partial taking. N.C.G.S. § 40A-64(b) allows a property owner to choose the greater of the fair market value before and after the property is taken or the fair market value of the property taken. It is this choice available under N.C.G.S. § 40A-64 and not available under N.C.G.S. § 136-112 that defendants contend violates their constitutional rights.

Defendants claim that this classification between condemnees is not rationally related to any legitimate governmental purpose. However, we agree with the DOT: defendants have failed to carry their burden of proving that there is no rational reason for this distinction. As the DOT suggests, the General Assembly could have determined that public and private condemnors can offset some of their costs through user fees for the service installed through the condemnation services such as water or sewage facilities. Thus, the General Assembly could rationally have believed that public and private condemners should pay damages using either of the two methods allowed by N.C.G.S. § 40A-64.

Furthermore, it is perfectly reasonable for the General Assembly to have determined that, having given the power of eminent domain across this state to every municipality and county; every housing authority; and every private corporation involved in power generation, railroads, telephones, etc., the best way to ensure that a citizen whose property was taken by eminent domain would receive just compensation was by giving him a choice. The circumstances under N.C.G.S. § 40A govern a huge range of types of uses, condemning authorities, and circumstances that would require just compensation. Such a situation is drastically different from the uniform practice of the DOT, an agency of the state, condemning property all across the state for roads. Either of these justifications is sufficient to withstand rational-basis review. Therefore, this classification does not violate the Equal Protection Clause of the United States or North Carolina Constitution.

N.C.G.S. § 136-112(1) is a valid exercise of the legislative power of the North Carolina General Assembly. It does not violate the Equal Protection Clause of the United States or North Carolina Constitution. We therefore reverse the Court of Appeals as to this issue.

Based upon the foregoing, we reverse the decision of the Court of Appeals.

REVERSED.

Appendix B–1

NO. COA97-1470

NORTH CAROLINA COURT OF APPEALS

Filed: 20 June 2000

DEPARTMENT OF TRANSPORTATION

Plaintiff,

v.

Catawba County
No. 96 CvS 1630

JOE C. ROWE and wife,. SHARON B. ROWE; HOWARD L. PRUITT, JR., and wife, GEORGIA PRUITT; ROBERT W. ADAMS, Trustee; ALINE D. BOWMAN; FRANCES BOWMAN BOLLINGER; LOIS BOWMAN MOOSE; DOROTHY BOWMAN ABERNETHY and husband, KENNETH H. ABERNETHY; MARTHA BOWMAN-CAUDILL and husband, JACK CAUDILL; APPALACHIAN OUTDOOR ADVERTISING CO., INC.. (formerly Appalachian Poster Advertising Company, Inc.), Lessee; and FLORENCE BOWMAN BOLICK

Defendants.

Appeal by defendants from judgment entered by Judge J. Marlene Hyatt on 17 June 1997 in Superior Court, Catawba County and orders entered by Judge James L. Baker, Jr., on 8 May 1997 and 16 May 1997 in Superior Court, Catawba County. Heard in Court of Appeals 27 August 1998. On 20 October 1998, the Court of Appeals issued a unanimous decision, 131 N.C. App. 206, 505 S.E.2d 911 (1998), holding in pertinent part that defendants Rowe and Pruitt did not file a timely appeal of preliminary orders entered by Judge Baker following a hearing under N.C. Gen. Stat. § 136-108, but finding error in the admission of evidence which required a new trial in the case. Under N.C. Gen. Stat. § 7A-31 (1999), the

Supreme Court granted discretionary review of this Court's decision on the issue of timeliness of the appeal by defendants Rowe and Pruitt from the interlocutory orders entered on 8 May 1997 and 16 May 1997, and held that "the interlocutory orders entered did not affect a substantial right of defendants and that defendants were not required to immediately appeal the trial court's orders." The case was remanded to this Court for a determination of the issues raised by the appeal from the interlocutory orders.

Attorney General Michael F. Easley, by Assistant Attorney General J. Bruce McKinney, for plaintiff-appellee.

Lewis & Daggett, P.A., by Michael J. Lewis; and Bell, Davis & Pitt, PA, by Stephen M. Russell, for defendants-appellants.

WYNN, Judge.

On 26 June 1995, the North Carolina Department of Transportation brought a declaration of taking action in Superior Court, Catawba County condemning 11.411 acres of the 18.123 acres of land belonging to Joe C. Rowe and his wife, Sharon B. Rowe, and Howard L. Pruitt, Jr., and his wife, Georgia M. Pruitt. However, because the Department of Transportation concluded that the benefits to the defendants' remaining 6.712 acres of property outweighed any loss to the defendants due to the taking, it did not make a deposit of estimated compensation for the 11.411 acres of taken property.

The defendants answered alleging that the "special or general benefits" provision of the condemnation statute, N.C. Gen. Stat. § 136-112(1) (1999), denied them equal protection in violation of the North Carolina and United States Constitutions. The defendants also challenged the Department of Transportation's claim that all of the defendants' remaining tracts of land should be considered in comparing the benefits of the taking to the defendants' resulting loss.

The trial court conducted a pretrial hearing under N.C. Gen. Stat. § 136-108 to settle issues other than the amount of damages. The evidence showed that after the taking the defendants were left with four small tracts of land identified as tracts A, B, C, and D, totaling 6.712 acres. Before the taking, tract A connected to the easternmost part of the property taken by the Department of Transportation and tract B connected at the westernmost part of the taken property. A 70 foot strip of land owned by the City of Hickory separated tract B from tracts C and D. A 60 foot strip of land owned by the City of Hickory separated tracts C and D from each other. The evidence showed that the City of Hickory intended to construct streets on the 60 and 70 foot strips; but, no streets had been constructed on the strips as of the date of the taking.

The trial court determined that the defendants' four remaining tracts had "physical unity" with the condemned property and were therefore, affected by the taking. The trial court also rejected the defendants' claim that the condemnation statute, N.C.G.S. § 136-112(1), was unconstitutional.

Following the preliminary hearing, the matter of just compensation was tried before a jury in the Superior Court, Catawba County. At trial, the trial court instructed the jury that it could consider any special and general benefits to the defendants' property which was not taken, including tracts C and D. The jury returned a verdict concluding that the defendants were not entitled to any compensation for the involuntary taking of their 11.411 acres because the increased value of the remaining four tracts offset the loss of the taken property.

From the trial court's judgment consistent with the jury's verdict, the defendants appeal contending that: (I) the trial court erred in including tracts C and D in the area affected, thereby treating all of the defendants' property as a "unified tract" and (II) N.C.G.S. § 136-112(1), which allows a deduction

from just compensation for "special or general benefits" resulting from the taking, is unconstitutional on its face and as applied to these defendants.

I. AREA AFFECTED BY THE TAKING

The defendants first contend that the trial court erred in including tracts C and D in the area affected by the condemnation proceeding. In support, they argue that tracts C and D have neither physical unity nor unity of use with the land taken by the Department of Transportation.

In most cases, the landowner is the party who seeks to add additional property to the area affected by a condemnation taking of his property in an attempt to increase his damages. *See e.g., City of Winston-Salem v. Yarbrough*, 117 N.C. App. 340, 451 S.E.2d 358 (1994). But in this case, it is the condemning authority—the Department of Transportation—which seeks to: (1) include tracts C and D in the area affected by the taking and (2) show that tracts C and D are benefitted by the taking to the extent that the Department of Transportation may avoid paying the landowner defendants any compensation whatsoever for the condemned 11.411 acres.

The determination of whether there is a unity of lands in a condemnation proceeding must be based on the facts of each case. The factors which are usually emphasized in such a determination include "unity of ownership, physical unity and unity of use." *Barnes v. North Carolina State Highway Comm'n*, 250 N.C. 378, 384, 109 S.E.2d 219, 224-25 (1959). Although unity of use is given great weight, the tracts claimed as a single tract "must be owned by the same party or parties." *Id.* at 384, 109 S.E.2d at 225.

In this case, the parties stipulated that there was unity of ownership as to all tracts, including tracts C and D. The parties also agreed that a strip of land owned by the City of Hickory

separates tracts C and D and that another strip of land owned by the City of Hickory separates tracts C and B.

In general, parcels of land must be contiguous to constitute a single tract for the purpose of determining severance damages and benefits. *Id.* "Contiguous" means "[t]ouching at a point or along a boundary." Black's Law Dictionary, p. 315 (7th Ed. 1999). "But in exceptional cases, where there is an indivisible unity of use, owners have been permitted to include parcels in condemnation proceedings that are physically separate and to treat them as a unit." *Barnes*, 250 N.C. at 385, 109 S.E.2d at 225.

> It is generally held that parcels of land separated by an established city street, in the use by the public, are separate and independent as a matter of law. 'When land is unoccupied and so not devoted to use of any character, and especially when it is held for purposes of sale in building lots, a physical division by wrought roads and streets creates independent parcels as a matter of law . . . (but) If the whole estate is practically one, the intervention of a public highway legally laid out but not visible on the surface of the ground is not conclusive that the estate is separated.' Nichols on Eminent Domain (3rd Edition), sec. 14.31(1), Vol. 4, pp. 437-8. Lots separated by a public alley but in a common enclosure have been held to be a single property. Mere paper division, lot or property lines and undeveloped streets and alleys and streets are not sufficient alone to destroy the unity of land. 'If the owner's land is merely crossed by the easement of another, the fee remaining in him, and the sections so made are not actually devoted, as so divided, to wholly different uses, they are to be considered wholly contiguous and so as a single parcel or tract.' 6 A.L.R.2d 1200, sec. 2.

Barnes, 250 N.C. at 385, 109 S.E.2d at 225 (citations omitted).

In this case, the defendants did not retain any interest in the strips of land deeded to the City of Hickory for streets, thereby tending to support a finding that there was no physical unity between tracts C and D and the tracts identified as A and B. Even assuming there was physical unity between the aforementioned tracts, lands will not normally be considered to constitute a single tract for the purpose of determining severance damages and benefits unless there is unity of use.

In *Barnes*, our Supreme Court set out the common law test for unity of use holding that:

> 'there must be a connection or relation of adaption, convenience, and actual and permanent use, as to make the enjoyment of the parcel taken reasonable and substantially necessary to the enjoyment of the parcel left, in the most advantageous and profitable manner in the business for which it is used.' The unifying use must be a present use. A mere intended use cannot be given effect.

Id. at 385, 109 S.E.2d at 224 (citation omitted).

Applying this rule in *City of Winston-Salem v. Tickle*, 53 N.C. App. 516, 281 S.E.2d 667 (1981), *disc. review denied*, 304 N.C. 724, 288 S.E.2d 808 (1982), our Court held that all of the tracts making up a family owned cattle farm was property affected by the taking of a portion of the property although the farm was divided by two roads and a railway. This Court found "that with a single exception the property was devoted to the single use of cattle farming." *Id.* at 524-25, 281 S.E.2d at 672. But our Court in *Tickle* did exclude one of the parcels from the area affected because that parcel was not used for farming. *See id.* at 527, 281 S.E.2d at 674.

Our General Assembly codified the *Barnes* rule in 1981 providing that "all contiguous tracts of land that are in the same

ownership and are being used as an integrated economic unit shall be treated as if the combined tracts constitute a single tract." N.C. Gen. Stat. § 40A-67 (emphasis added); *see also Department of Transportation v. Nelson Co.*, 127 N.C. App. 365, 368, 489 S.E.2d 449, 451 (1997) (holding that a partially completed office park being constructed as part of a master development plan met the unity of use requirement). It follows that where the uses of the tracts in question are independent of the portion which is taken rather than a part of the integrated economic unit, the tracts cannot be included as part of the area affected by the taking. *See North Carolina Department of Transportation v. Kaplan*, 80 N.C. App. 401, 343 S.E.2d 182 (holding that two tracts were not unified because on the date of the taking neither tract was necessary to the "use and enjoyment" of the other tract), *disc. review denied*, 307 N.C. 269, 299 S.E.2d 214 (1982).

At the time of the taking in this case, the landowners held the four remaining tracts for commercial development. However, the tracts were not being held for "development under a common plan or scheme," as in *Yarbrough*, and the best and highest use of tracts C and D remained economic development after the taking. Because the defendants' use and enjoyment of tracts C and D were not related to their use of tracts A and B, nor related to or affected by the area taken, no unity of use exists in this case. We, therefore, conclude that the trial court erred in finding that tracts C and D were part of the area affected by the taking.

II. CONSTITUTIONALITY OF N.C.G.S § 136-112(1)

The defendants next challenge the constitutionality of the provision allowing the fair market value of the remainder tract of land to be setoff with any "special or general benefits resulting from the utilization of the part taken for highway purposes" under N.C.G.S. § 136-112(1). They contend that allowing a setoff for "general benefits" resulting from the

taking violates the property owners' rights to: (A) just compensation and (B) equal protection by depriving them of the just compensation received by other property owners also subjected to condemnation proceedings. We address each argument separately.

A. JUST COMPENSATION

"The right to take private property for public use, the power of eminent domain, is one of the prerogatives of a sovereign state." *State v. Core Banks Club Properties, Inc.*, 275 N.C. 328, 334, 167 S.E.2d 385, 389 (1969). But this "right of eminent domain lies dormant in the State until the legislature, by statute, confers the power and points out the occasion, mode, conditions and agencies for its exercise." *Id.* That right, however, "is limited by the constitutional requirements of due process and payment of just compensation for property condemned." *Id.* at 334, 167 S.E.2d at 388.

Under N.C. Gen. Stat. § 136-18 (1999), our General Assembly delegated to the Department of Transportation the right to condemn private property for the establishment and maintenance of public highways. N.C.G.S. § 136-112 sets out the method for determining "just compensation" for owners of property condemned for highway purposes. Under that statute, the method used to determine just compensation when only a part of a tract of land is taken for the construction of highways is

> the difference between the fair market value of the entire tract immediately prior to the taking and the fair market value of the remainder immediately after the taking with consideration being given to any special or general benefits resulting from the utilization of the part taken for highway purposes.

N.C.G.S. § 136-112(1). The statutory term "special benefits" refers to those benefits which arise from the peculiar relation of

the land in question to the public improvement, while the term "general benefits" refers to those benefits which accrue to the public at large by reason of increased community property resulting from the project. *See Kirkman v. State Highway Comm'n*, 257 N.C. 428, 433, 126 S.E.2d 107, 112 (1962), *Department of Transportation v. McDarris*, 62 N.C. App. 55, 302 S.E.2d 277 (1983).

Although the General Assembly may enact a statute to determine the amount of just compensation to be given to landowners of condemned property, a statutory provision that transgresses the authority vested in the legislature by the Constitution empowers the judiciary to declare the act unconstitutional. *See Glenn v. Board of Education of Mitchell County, et. al*, 210 N.C. 525, 187 S.E. 781 (1936) (stating that "[i]t is well settled in this state that the courts have the power, and it is their duty, in proper cases to declare an act of the General Assembly unconstitutional; but it must be plainly and clearly the case"); *Wilson v. High Point*, 238 N.C. 14, 23, 76 S.E.2d 546, 552 (1953) (holding that the courts have a duty when it is clear a statute transgresses the authority vested in the legislature by the Constitution to declare the act unconstitutional).

Indeed, our Supreme Court has addressed many issues arising from the language of N.C.G.S. § 136-112(1). *See Kirkman*, 257 N.C. at 432, 126 S.E.2d at 111; *North Carolina State Highway Comm'n v. Black*, 239 N.C. 198, 79 S.E.2d 778 (1954); *Robinson v. State Highway Commission*, 249 N.C. 120, 105 S.E.2d 287 (1958); *Williams v. State Highway Comm'n*, 252 N.C. 514, 114 S.E.2d 340 (1960); *Templeton v. State Highway Comm'n*, 254 N.C. 337, 118 S.E.2d 918 (1961). But our Supreme Court has never addressed the issue presented in this appeal—whether the provision allowing *special* and *general* benefits to setoff the fair market value of the remaining part of a tract of land under N.C.G.S. § 136-112(1) violates the constitutional requirement of providing just compensation in

condemnation proceedings. Since the parties now bring this issue of first impression to this Court, we begin our consideration of this issue by looking at the just compensation methods employed by other jurisdictions to guide us in our determination.

1. RULES IN OTHER JURISDICTIONS ON THE USE OF SPECIAL AND GENERAL BENEFITS IN CALCULATING JUST COMPENSATION

The general rule in partial takings cases is that "special benefits" may be used to setoff damages to the remaining property, but not to offset the compensation due for the property taken. *See* 3 *Nichols on Eminent Domain*, § 8A.03, pp. 8A-46. In fact, jurisdictions[1] following the general rule have held that "a statute which authorizes the payment of any sum that is less than the market value of the land actually taken is unconstitutional. *See id.* at pp. 8A-48.

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[1] *City of Orofino v. Swayne*, 504 P.2d 398 (Idaho 1972) *Chiesa v. State*, 43 A.D.2d 359, 360-61 (N.Y. 1974); *William Natural Gas Co. v. Perkins*, 952 P.2d 483 (Okla. 1997) (holding that in a partial taking case in which condemnor is taking only part of condemnee's property, an increase in the value of remaining property may be offset against any injury to the remaining property, but an increase in the value of the remaining property may not be offset against the value of property that was taken); *State Dep't of Highways v. Stegemann*, 269 So.2d 480 (La. 1972) (holding that a landowner is entitled to demand at least the fair market value of the property taken in money from an expropriating authority, even though he may be damaged to a lesser extent by the taking); *State Highway Comm'n v. Hooper*, 488 P.2d 421 (Or. 1971) (holding that special benefits to the remainder as a result of a partial taking may be used only to reduce any damages claimed to the remainder and cannot be used to reduce the fair market value of the land actually taken); *State v. Carpenter*, 89 S.W.2d 979 (Tex. Comm'n App. 1936) (holding that where a portion of land is taken by condemnation damages to the remainder can be offset by benefits allowed by the law).

For instance, in *City of Orofino v. Swayne*, 504 P.2d 398 (Idaho 1972), the Idaho Supreme Court held that under Idaho's eminent domain statute, benefits which may accrue to the property remaining from a taking may not be considered, except as a setoff against the damages that have accrued to the remaining property as a result of the taking. The Idaho Court recognized that the tendency has been away from the rule that special benefits can be setoff from the entire compensation. Instead, the Idaho Court reasoned that the development of the rule that the land taken, at least, must be paid for in money without consideration of benefits to the remaining land is,

> 'undoubtedly explained by the fact that the propensity of many American communities to be over-sanguine in regard to the beneficial results of projected public improvements had resulted in the taking of much valuable private property for which the owner never received any compensation other than anticipated benefits which never accrued.'

Id. at 401 (quoting 3 *Nichols on Eminent Domain* (Rev. 3d. ed.) § 8.6206(1) p. 97).

Likewise, in *Chiesa v. New York*, 43 A.D.2d 359 (N.Y. App. Div. 1974), the New York Appellate Court held that it would be unconstitutional to allow any benefits to the claimant's remaining lands from the State's appropriation of a portion of the claimant's property to be used as an offset against the award for direct damages for the property taken. In reaching this holding, the New York Court determined that the "application of a rule permitting a setoff against direct damages for enhancement to the remainder would be an unconstitutionally discriminate exercise of taxing power in favor of a neighboring owner who suffers no loss of land, but benefits by the public improvement which led to the taking." *Id.* at 360. The New York Court found that just compensation

> means fair and adequate monetary compensation for land actually taken, regardless of any benefits which may be conferred upon the remainder due to the direct taking . . . .

Id.

Notwithstanding the general rule, the United States Supreme Court, along with a number of other jurisdictions, has held that in partial takings cases setting off the value of the remaining part of the land with "special benefits" resulting from the purpose for which a portion of the tract of land was taken does not violate a property owner's right to just compensation.[2] According to the Supreme Court, "[j]ust compensation means a compensation that would be just in regard to the public, as well as in regard to the individual." *Bauman v. Ross*, 167 U.S. 548, 574, 42 L. Ed. 270, 42 L. Ed. at 283 (1897). Moreover, the "just compensation required by the constitution to be made to the [property] owner is to be measured by the loss caused to him by the appropriation." *Id.* Therefore, the property owner "is entitled to receive the value of what he has been deprived of, and no more." *Id.*

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[2] *See Bauman v. Ross*, 167 U.S. 548, 42 L. Ed. 270 (1897); *Lazenby v. Arkansas State Highway Comm'n*, 331 S.W.2d 705 (Ark. 1960) (holding that when the taking is by a municipal corporation, special benefits may be setoff, even from the value of the land taken); *State v. Midkiff*, 516 P.2d 1250 (Haw. 1973) (holding that in non-highway taking cases, special benefits may be setoff against the value of the part taken and severance damages); *Collins v. State Highway Comm'n*, 66 P.2d 409 (An. 1973) (holding that when a municipal corporation acquires property for a highway purpose, special benefits may be setoff from the value of the land taken and damages); *State v. Ward*, 252 P.2d 279 (Wa. 1953) (holding that when the taking is by a state or municipal corporation, benefits may be setoff from the value of the property taken and damages).

> Consequently, when part of a parcel of land is taken for a highway, the value of that part is not the sole measure of the compensation or damages to be paid to the owner; but the incidental injury or benefit to the part not taken is also to be considered.

Id.

In contrast to the general rule's application to "special benefits", most jurisdictions[3] hold that "general benefits" may not be used to setoff damages "because the owner whose land is taken would be placed in a worse position than his neighbor whose estate lies outside the path of improvement and who shares in the increased value without any pecuniary loss." *Nichols*, § 8A.03, pp. at 8A-47.

> Arguably the setoff of general benefits denies the condemnee the constitutional guarantee of just compensation since he is singled out and deprived of a share in the increased prosperity of his fellow citizens merely because the public happens to want a portion of his land. The condemnee pays in taxation for his share of general benefits, just as

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[3] *See e.g., Phoenix Title & Trust Co. v. State of Arizona ex rel. Herman*, 425 P.2d 434 (Ariz. 1967); *Lazenby v. Arkansas State Highway Comm'n*, 331 S.W.2d 705 (Ark. 1960); *Denver Joint Stock Land Bank v. Board of County Com'rs of Elbert County*, 98 P.2d 283 (Colo. 1940); *Schwartz v. City of New London*, 120 A.2d 84 (Conn. Com. Pl. 1955); *Acierno v. State of Delaware*, 643 A.2d 1328 (Del. Supr. 1994); *City of Wichita v. May's Co. Inc.*, 510 P.2d 184 (Kan. 1973); *Louisiana Power & Light Co. v. Lasseigne*, 240 So.2d 707 (La. 1970); *Amory v. Commonwealth*, 72 N.E.2d 549 (Mass. 1947); *State Highway Comm'n v. Vorhof-Duenke Co.*, 366 S.W.2d 329 (Mo. 1963); *Frank v. State, Dep't of Roads*, 129 N.W.2d 522 (Neb. 1964); *State Highway Comm'n v. Bailey*, 319 P.2d 906 (Or. 1957); *State v. Davis*, 140 S.W.2d 861 (Tex. Civ. App. 1940), *disapproved by State v. Meyer*, 403 S.W.2d 366 (Tex. 1966); *State Highway Comm'n v: Rollins*, 471 P.2d 324 (Wyo. 1970).

> other members of the public, and therefore is entitled to receive his fair portion of general advantages brought about by a public improvement.

However, the United States Supreme Court left the determination as to whether using *general* benefits as a setoff deprives a property owner of just compensation to the states. In fact, the Court stated that:

> we are unable to say that [the property owner] suffers deprivation of any fundamental right when a state goes one step further and permits consideration of actual benefits—enhancement in market value—flowing directly from a public work, although all in the neighborhood receive like advantages. In such case the owner really loses nothing which he had before; and it may be said with reason, there has been no real injury.

McCoy v. Union Elevated R. Co., 247 U.S. 354, 366, 62 L. Ed. 1156, 1164 (1918); *see McRea v. Marion County*, 133 So. 278, 279 (Ala. 1931) (stating that "the United States Supreme Court leaves the question to the states, with assurance that, if the Constitution and laws of the state permit a deduction of general benefits, it will not violate the Fifth and Fourteenth Amendments to the United States Constitution").

Accordingly, some states[4] do not follow the majority rule; rather, these states allow both *special* and *general* benefits to

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[4] *See e.g., State ex rel. State Highway Comm'n v. Atchison, Topeka & Santa Fe Ry. Co.*, 417 P.2d 68 (N.M. 1966) (holding that the benefit of construction of a highway which enhances the value of a remainder of a tract of land is to be included in the determination of the value of the land after the taking); *Smith v. City of Greenville*, 92 S.E.2d 639 (S.C. 1956) (holding that the benefits to the residue of a landowner's land from the construction of a street should be applied against the value of the land actually taken).

setoff either the severance damages or the value of the land of the property taken. *See Nichols*, § 8A.03, pp. at 8A-47.

2. THE EFFECT OF NORTH CAROLINA'S USE OF SPECIAL AND GENERAL BENEFITS IN CALCULATING JUST COMPENSATION

In North Carolina, N.C.G.S. § 136-112(1) permits both *special* and *general* benefits to setoff the value of the land taken for highway purposes. Most recently, this Court in *Department of Transportation v. Mahaffey*, 2000 WL 390133 (N.C. App. April 18, 2000) in construing *Bauman*, 167 U.S. at 574, 42 L. Ed.2d at 283, stated that:

> [a]s we are unable to discern any material difference before the Bauman court and section 136-112, we hold section 136-112 does not violate the federal Due Process Clause.

Mahaffey, 2000 WL 390133 (N.C. App. April 18, 2000).

In *Bauman*, the United States Supreme Court upheld a federal statute which provided that in estimating damages for the taking of any land, the jury should take into consideration the benefit to the owner by enhancing the value of the remainder of his land. *Bauman*, 167 U.S. at 548, 42 L. Ed.2d at 270. *Bauman*—unlike N.C.G.S. § 136-112(1)—also provided for an assessment of one-half the cost of any improvement upon the adjacent property and directed that, in case any sum had been deducted for benefits from the award for land taken, allowance for the deduction should be made in determining the amount of the assessment. *Id.*

The United States Supreme Court limited its decision in *Bauman* by its later pronouncement in *McCoy*, 247 U.S. at 354, 62 L. Ed. at 1156. In *McCoy*, the Supreme Court held that states have the discretion of determining whether using *general* benefits as a setoff deprives a property owner of just compensation. *McCoy*, 247 U.S. at 354, 62 L. Ed. at 1156.

Thus, since we only addressed the applicability of *Bauman* in *Mahaffey*, we left undetermined the question of whether using *general* benefits as a setoff constitutes just compensation.

And, we again reiterate the holding of *Mahaffey* that the "special benefits" rule of N.C.G.S. § 136-112(1) is constitutionally sound. In comparing that provision with the various methods employed by other jurisdictions in calculating just compensation, we find that our statutory rule allowing "special benefits" to affect the value of the remaining tract of land does not violate the constitutional requirement of providing just compensation in condemnation proceedings. Indeed, since any resulting "special benefits" are uniquely enjoyed by the property condemned, assessing a cost through a setoff, is constitutionally permissible and has been consistently approved by the United States Supreme Court, along with a number of other jurisdictions.[5] *See Kirkman*, 257 N.C. at 433, 126 S.E.2d at 112.

Moreover, given the legislature's discretion in determining just compensation, without a clear indication that a different result must exist, the legislature's enactment of the statute's provision for "special benefits" must be upheld. *See Glenn*, 210 N.C. at 525, 187 S.E. at 781; *Wilson*, 238 N.C. at 23, 76 S.E.2d at 552. And for a different result to be reached, such a determination would have to made by our legislature, not this Court. *See id.*

However, we reach a different conclusion as to our "general benefits" rule under N.C.G.S. § 136-112(1) which allows the *general* benefits to affect the value of the remaining property. Since "general benefits" are those benefits which accrue to the general public as a result of the condemnation of certain property for public purposes, that provision of the statute charges the property owner with a cost for those benefits

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[5] *See* note 2, *supra*.

that the public also enjoys without being subjected to any similar charge. *See McDarris*, 62 N.C. App. at 55, 302 S.E.2d at 277. In effect, the property owner is subjected to an involuntary taking of his property while also being subjected to the injustice of receiving an amount less than what he has actually loss. *See Nichols*, § 8A.03, pp. at 8A-49 ("Forcing the condemnee not only to give up a portion of his land, but also to receive nothing for it places a disproportionate share of the cost of the public improvement on his shoulders."). He is placed in a position where he is being required to carry the undue burden of paying an additional cost not paid by the public merely because his property has been taken for public purposes.

To emphasize the undue burden placed upon a property owner subjected to the provisions of N.C.G.S. § 136-112(1), consider the following hypothetical case: Farmer Jones owns 20 acres of land with a fair market value of $50,000.00. Through eminent domain, the government condemns 15 acres of Farmer Jones' property for highway purposes. In computing just compensation under N.C.G.S. § 136-112(1), the government determines that the value of the surrounding property and the remaining 5 acres has so greatly increased in value as a result of the new highway that Farmer Jones should get nothing for the 15 acres that it took from him. Farmer Jones' sacrifice of 15 acres of his land for the surrounding land owner and the public illustrates how a pure economic analysis can fail to import fairness and due process in condemnation damage determination. It further shows that the "cost and benefit" result of computing just compensation under N.C.G.S. § 136-112(1) fails to consider the private involuntary taking of land for public good. Should the government decide who will get the *full* benefit of his land at the *expense* of others? Surely the results under our statute suggest that had the government taken another landowner's land, then Farmer Jones would have enjoyed the increased valuation of his entire 20 acre tract.

Likewise, in this case, the Department of Transportation condemned 11.411 acres of the defendants' 18.123 acres of property. In return, the defendants received no compensation for their taken property because the accrued benefits resulting from the roadway caused the fair market value of the remaining 6.712 acres to equal or exceed the fair market of the whole tract of land before the taking.

In essence, by allowing general benefits to setoff the fair market value of the remaining land, the statute allows a compensation which is unjust to the condemnee while providing a windfall to the public. We agree with the rule in most jurisdictions that a statute, such as N.C.G.S. § 136-112(1), allowing *general* benefits to be used as a setoff is unconstitutional.[6] Accordingly, we hold that the provision regarding *general* benefits under N.C.G.S. § 136-112(1) violates, on its face and as applied to the defendants in this case, the constitutional requirement of providing just compensation in condemnation proceedings.

B. EQUAL PROTECTION

Alternatively, the defendants contend that N.C.G.S. § 136-112(1) violates the equal protection rights of the property owners who have part of a tract of land condemned for highway purposes because they are denied the just compensation received by other property owners also subjected to condemnation proceedings. We agree.

In addressing a claim that the Equal Protection Clause has been violated, the courts employ a two-tiered analysis. *See In re Consolidated Appeals of Certain Timber Companies from the Denial of Use Value Assessment and Taxation by Certain Counties*, 98 N.C. App. 412, 419, 391 S.E.2d 503, 507 (1990).

The upper tier is employed

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[6] *See* note 3, *supra*.

> [w]hen a governmental act classifies persons in terms of their ability to exercise a fundamental right . . . or when a governmental classification distinguishes between persons in terms of any right, upon some 'suspect' basis . . . .

Texfi Industries, Inc. v. City of Fayetteville, 301 N.C. 1, 11, 269 S.E.2d 142, 149 (1980) (citations omitted). This tier, calling for strict scrutiny, "requires the government to demonstrate that the classification is necessary to promote a compelling governmental interest." *Id.*

The lower tier is employed "[w]hen an equal protection claim does not involve a 'suspect class' or a fundamental right . . ." *Id.* "This mode of analysis merely requires that distinctions which are drawn by a challenged statute or action bear some rational relationship to a conceivable legitimate governmental interest." *Id.*

In the present case, the defendants support their equal protection claim by comparing the method of determining just compensation under subsection (1) of N.C.G.S. § 136-112 with the methods of determining just compensation when: (1) part of a tract of land is condemned under Chapter 40A of the General Statutes and (2) a whole tract of land is condemned for highway purposes under subsection (2) of N.C.G.S. § 136-112.

Because just compensation—the basis of the classification in the present case—is a fundamental right protected under both the federal and state constitutions, we employ strict scrutiny in analyzing the defendants' equal protection claim. *See* U.S. Const. amend. V; N.C. Const. Art. I § 19.

As stated, N.C.G.S. § 136-112(1)'s provision allowing the general benefits to be used as a setoff violates the property owners' rights to just compensation for the property taking. However, a similar setoff is not imposed upon a property owner subjected to a taking under N.C. Gen. Stat. § 40A-64(b). In

fact, this statute provides that for partial takings cases, the method for determining just compensation is.

> the greater of either (i) the amount by which the fair market value of the entire tract it immediately before the taking exceeds the fair market value of the remainder immediately after the taking; or (ii) the fair market value of the property taken.

N.C.G.S. § 40A-64(b) (1999).

Therefore, a property owner will receive just compensation if the taking is imposed under N.C.G.S. § 40A-64(b), even though the same property owner is not entitled to compensation which is just if the imposed taking is under N.C.G.S. § 136-112(1). Both statutes involve partial takings cases with the difference being who is the condemnor. Under the former statute, the condemnor is an entity other than the Department of Transportation, while the Department of Transportation is the condemnor under the later statute.

Hence the classification between N.C.G.S. § 40A-64(b) and N.C.G.S. § 136-112(1) is based on whether the taking is for highway purposes. Because there is no compelling governmental interest to support this classification, we must find that a property owner's equal protection rights are violated by allowing such a classification to exist.

Also, we find that a property owner's equal protection rights are violated by the distinction in the compensation method under subsection (1) of N.C.G.S. § 136-112 and the compensation method statute, like consideration under subsection (2) of N.C.G.S. § 136-112. Subsection (2) of the N.C.G.S. § 40A-64(b), does not require a consideration of the general benefits resulting from the condemnation. In particular, N.C.G.S. § 136-112(2) provides that:

> [w]here the entire tract is taken the measure of damages for said taking shall be the fair market value of the property at the time of taking.

N.C.G.S. § 136-112(2).

Thus, a property owner who has a whole tract of land condemned for highway purposes under N.C.G.S. § 136-112(2) receives just compensation, while a property owner who has only a part of a tract of land condemned for highway purposes does not receive just compensation. The result of the classification is that a property owner who has only a part of a tract of land condemned for highway purposes, as opposed to a whole tract of land condemned for the same purpose, is being penalized for not having his whole tract condemned. No compelling governmental interest exists to support such a penalty. Therefore, the provision allowing *general* benefits to be used as a setoff under N.C.G.S. § 136-112(1) violates, on its face and as applied to the defendants in this case, the constitutional requirements of equal protection under the law.

Finding N.C.G.S. § 136-112(1) to be violative of both the constitutional requirement of just compensation and the constitutional requirement of equal protection, we hold that the trial court erred in concluding "that the defendants . . . failed to present sufficient evidence to support the constitutional issues raised and the relief requested." For the reasons set out in our prior opinion filed herein, and because of the errors stated herein, there must be a

New trial.

Judge HUNTER concurs.

Judge HORTON dissents in part in a separate opinion.

NO. COA97-1470

NORTH CAROLINA COURT OF APPEALS

Filed: 20 June 2000

DEPARTMENT OF TRANSPORTATION

Plaintiff,

v.

Catawba County
No. 96 CvS 1630

JOE C. ROWE and wife,. SHARON B. ROWE; HOWARD L. PRUITT, JR., and wife, GEORGIA PRUITT; ROBERT W. ADAMS, Trustee; ALINE D. BOWMAN; FRANCES BOWMAN BOLLINGER; LOIS BOWMAN MOOSE; DOROTHY BOWMAN ABERNETHY and husband, KENNETH H. ABERNETHY; MARTHA BOWMAN-CAUDILL and husband, JACK CAUDILL; APPALACHIAN OUTDOOR ADVERTISING CO., INC.. (formerly Appalachian Poster Advertising Company, Inc.), Lessee; and FLORENCE BOWMAN BOLICK

Defendants.

HORTON, Judge, dissenting in part.

I concur in that portion of the majority opinion which holds that the trial court erred in finding that tracts C and D were part of the area affected by the taking of defendants' property. I respectfully dissent, however, from that portion of the majority opinion holding that N.C. Gen. Stat. § 136-112(1) violates "both the constitutional requirement of just compensation and the constitutional requirement of equal protection . . . ."

I.

With regards to the constitutionality of N.C. Gen. Stat. § 136-112(1), most of the arguments now advanced by the defendants were not made in the trial court and are not properly before us on this appeal. *See State v. King*, 342 N.C. 357, 364, 464 S.E.2d 288, 293 (1995); *State v. Benson*, 323 N.C. 318, 322, 372 S.E.2d 517, 519 (1988). In their "Answer, Motions and Counterclaim," defendants allege as a First Defense "[t]hat N.C. Gen. Stat. § 136-112(1), insofar as it provides that the measure of damage be determined 'with consideration being given to any special or general benefits resulting from the utilization of the part taken for highway purposes,'" denies the defendants just compensation in violation of Article I, Section 19, of the North Carolina Constitution ("law of the land" provision); Amendment V to the United States Constitution ("just compensation" provision); and Amendment XIV to the United States Constitution ("equal protection" and "due process of law" provisions).

At a pretrial hearing pursuant to N.C. Gen. Stat. § 136-108, the defendants argued there were two bases for their constitutional challenge to N.C. Gen. Stat. § 136-112(1). Defendants first made an equal protection argument, contending that just compensation for a partial taking of property is calculated under two different statutory schemes: one for property owners whose lands were condemned by the Department of Transportation (DOT) pursuant to the provisions of Chapter 136, and the other for property owners whose lands were condemned by private and local public condemnors pursuant to the provisions of Chapter 40A of the General Statutes. In determining the issue of damages under the provisions of N.C. Gen. Stat. § 136-112(1), the finder of fact is to consider "general and special benefits" to the portion of the lands not taken, while under N.C. Gen. Stat. § 40A-64(b) no such consideration is mandated. Defendants argued to the trial court that since the measure of compensation was different

depending on the identity of the condemning authority, landowners whose property was condemned were treated differently and thus deprived of equal protection. Defendants also stated prior to their argument on this point that their "constitutional attack on the benefits portion of Chapter 136 . . . *is based very simply on this premise* . . . ." (Emphasis added.)

The second argument made by defendants was that DOT acted arbitrarily and capriciously, in failing to offer any compensation to defendants, treating these defendants in a different manner than other nearby landowners—such as Martin Marietta—who had been paid compensation by DOT. That contention was properly overruled by the trial court due to an absence of evidence of arbitrariness or caprice by DOT, and is not before us at this time.

Further, two of defendants' Assignments of Error relate to the constitutional question raised by defendants. They are:

> 3. The Trial Court's denial of Defendants' constitutional defenses on the grounds that G.S. 136-12(1) [sic] violates the equal protection provisions of the United States and North Carolina Constitutions.
>
> 4. The Trial Court's allowing the Jury to consider the benefit to Defendants' property in making its determination as to damages recoverable by the Defendants for the taking in that this violated Defendants' rights to equal protection under the United States and North Carolina Constitutions.

Even according a generous interpretation to the Assignments of Error, it is obvious that defendants have not preserved and brought forward a constitutional challenge based on a due process argument. Further, a unanimous panel of this Court has

recently squarely rejected such an argument in *Dept. of Transportation v. Mahaffey*, __ N.C. App. __, __ S.E.2d __ (COA99-567) (filed 18 April 2000) ("[S]ection 136-112 does not violate the federal Due Process Clause. It, therefore, follows our state constitution 'law of the land' clause is not violated.")

At most, then, defendants have brought forward (1) the equal protection argument they advanced below centering on the different measures of damages for landowners whose property is taken under Chapter 136 and those whose property is taken under Chapter 40A; and (2) an argument that the trial court erred in allowing the jury to consider the "special and general benefits" to defendants' property in determining damages. Thus, much of the majority opinion deals with questions of constitutional law which are not properly before us, and declares section 136-112(1) unconstitutional based on theories not advanced before the trial court. "[A] constitutional question which is not raised and passed upon in the trial court will not ordinarily be considered on appeal." *State v. Hunter*, 305 N.C. 106, 112, 286 S.E.2d 535, 539 (1982).

II.

The constitutional issue which is properly before us is whether the equal protection provisions of the Constitutions of the United States and the State of North Carolina are violated by the different damages schemes found in sections 136-112(1) and 40A-64(b).

A sovereign state has the inherent power to take the property of its citizens for public use. The exercise of that power is limited, however, by constitutional guarantees of due process and payment of "just compensation" for the property taken. *State v. Club Properties*, 275 N.C. 328, 334, 167 S.E.2d 385, 388 (1969). In Chapter 136 of our General Statutes, our General Assembly confers the right of eminent domain on DOT, and sets out the method for determining just

compensation for the property taken. N.C. Gen. Stat. § 136-103, *et seq*. Where an entire tract is taken, the measure of damages is "the fair market value of the property at the time of taking." N.C. Gen. Stat. § 136-112(2) (1999). Where only a portion of a tract is taken, as in the case before us,

> the measure of damages for said taking shall be the difference between the fair market value of the entire tract immediately prior to said taking and the fair market value of the remainder immediately after said taking, *with consideration being given to any special or general benefits resulting from the utilization of the part taken for highway purposes*.

N.C. Gen. Stat. § 136-112(1) (1999) (emphasis added). The burden of proof on the existence and amount, of such special or general benefits is on DOT. *Board of Transportation v. Rand*, 299 N.C. 476, 480, 263 S.E.2d 565, 568 (1980). Defendants here contend that allowing the jury to consider the benefits to the remainder of their property affected by the taking violates their right to equal protection under the law. Defendants stress that where property is condemned by a private condemnor or a local public condemnor pursuant to the provisions of Chapter 40A of the General Statutes, a different method of determining damages is mandated. N.C. Gen. Stat. § 40A-64(b) provides that

> [i]f there is a taking of less than the entire tract, the measure of compensation is the greater of either (i) the amount by which the fair market value of the entire tract immediately before the taking exceeds the fair market value of the remainder it immediately after the taking; or (ii) the fair market value of the property taken.

Our Supreme Court set out in *Texfi Industries v. City of Fayetteville*, 301 N.C. 1, 269 S.E.2d 142 (1980), the traditional

two-tiered "scheme of analysis when an equal protection claim is made." *Id.* at 10, 269 S.E.2d at 149. First,

> [w]hen a governmental act classifies persons in terms of their ability to exercise a fundamental right, or when .a governmental classification distinguishes between persons in terms of any right, upon some "suspect" basis, the upper tier of equal protection analysis is employed. Calling for "strict scrutiny", this standard requires the government to demonstrate that the classification is necessary to promote a compelling governmental interest.

Id. at 11, 269 S.E.2d at 149 (citations omitted). I do not find evidence here that the defendants are members of a class which is "saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command particular consideration from the judiciary." *Id.* Nor do I find an infringement of the defendants' constitutionally guaranteed right to just compensation for property taken for a public purpose. "Just compensation" is not defined in either our Constitution or that of the United States, but is left to the sound discretion of state legislatures. Our General Assembly has set out in N.C. Gen. Stat. § 136-112 the method for determining just compensation where property is taken by DOT.

Moving then to the second tier of the analysis, the question becomes whether N.C. Gen. Stat. § 136-112 bears a rational relationship to a legitimate governmental purpose "This mode of analysis merely requires that distinctions which are drawn by a challenged statute or action bear some rational relationship to a conceivable legitimate governmental interest." *Texfi*, 301 N.C. at 11, 269 S.E.2d at 149.

Clearly, the construction and maintenance of a statewide system of roads is a legitimate public purpose. In the course of development of roads throughout the state, it is inevitable that

some privately held property must be taken for public purposes. Our General Assembly has granted the power of eminent domain to DOT. N.C. Gen. Stat. § 136-18 (1999). In the interest of fairness and in satisfaction of constitutional guarantees that just compensation be paid to a citizen whose property is taken for public purposes, the General Assembly has set out in N.C. Gen. Stat. § 136-112 the measure of damages for such taking. All citizens whose property is taken by DOT have their damages measured by the same standard. I find here no evidence that defendants have been treated in a different manner than other members of the class of persons affected by condemnation of a part of their property for highway purposes. After careful consideration of defendants' arguments and contentions, I cannot find any evidence of a violation of their constitutional rights to equal protection, and find support for my opinion in the prior decisions of our Supreme Court.

It has long been settled in North Carolina that it is within the power of the General Assembly to provide that, when only a portion of the landowner's property is taken in a condemnation action, the trier of fact is to consider both special and general benefits to the remainder of the landowner's property in determining the amount of just compensation to be paid him. *Miller v. Asheville*, 112 N.C. 759, 16 S.E. 762 (1893); *Wade v. Highway Com.*, 188 N.C. 210, 124 S.E. 193 (1924); *Elks v. Comrs.*, 179 N.C. 241, 102 S.E. 414 (1920); *Bailey v. Highway Commission*, 214 N.C. 278, 199 S.E. 25 (1938).

In *Miller*, our Supreme Court upheld the validity of an Act of our General Assembly providing that both general and special benefits must be considered in assessing landowners' damages arising from a condemnation of a portion of their property by the City of Asheville. "The Legislature, in conferring upon the corporation [City of Asheville] the exercise of the right of eminent domain, can *in its discretion* require all the benefits or a specified part of them, or forbid any of them to be assessed as offsets against the damages." *Miller*, 112 N.C.

at 768, 16 S.E. at 764 (emphasis added). Where the legislature made no such provision, however, the "old" rule applied, and only special damages could be deducted. In *R.R. v. Platt Land*, 133 N.C. 266, 45 S.E. 589 (1903), after tracing the history of the rule, Justice Connor stated that "*in the absence of any express language to the contrary*, only special benefits can be deducted from the compensation or damages assessed against the corporation [Southport, Wilmington and Durham Railroad Company]." *Id.* at 274, 45 S.E. at 592.

In *Elks*, Chief Justice Clark, who authored the opinion in *Miller*, again cited the holding of the Supreme Court in *Miller* that the legislature could "authorize the deduction of general as well as special benefits from the damages assessed, but holding that if the statute does not so provide, only the special benefits will be deducted." *Elks*, 179 N.C. at 247, 102 S.E. at 417.

In 1923, the General Assembly amended the statutes setting out the measure of damages in condemnations brought by the State Highway Commission, to provide that both "general and special benefits shall be assessed as off-sets against damages . . . ." Public Laws 1923, Chapter 160, sec. 6. Our Supreme Court, citing *Miller* with approval, upheld the validity of the change and its application to pending litigation in *Wade*, 188 N.C. 210, 124 S.E. 193. The Supreme Court remanded *Wade* to the trial court for a new trial on damages because the trial court only charged the jury to consider the special benefits accruing to the landowner, and did not include the general benefits to the landowner's remaining property. *Id.* Again, in *Bailey v. Highway Commission*, the Supreme Court remanded for a new trial because the trial court did not charge the jury to consider the general benefits to the landowner's remaining property as an offset against the amount of compensation. 214 N.C. 278, 279, 199 S.E. 25, 26 (1938). *See also Kirkman v. Highway Commission*, 257 N.C. 428, 433, 126 S.E.2d 107, 111 (1962), and the cases cited therein.

Thus, it appears that for more than a century, our Supreme Court has upheld the doctrine of *Miller v. Asheville* and the power of the General Assembly to provide that damages in a condemnation case may be offset by special benefits, general benefits, or both special and general benefits. In the exercise of its discretion, the General Assembly has provided for a different measure of damages where property is taken by private condemnors and local public condemnors under the provisions of Chapter 40A. N.C. Gen. Stat. § 40A-64(b). By contrast, where property is taken by DOT, as here, the jury is to take into account both special and general benefits in determining the issue of damages. N.C. Gen. Stat. § 136-112(1). I do not believe that any equal protection violation arises because of the distinction between the measure of damages in the two statutes. As Chief Justice Clark explained in *Elks*:

> The distinction seems to be that where the improvement is for private emolument, as a railroad or water power, or the like, being only a *quasi*-public corporation, the condemnation is more a matter of grace than of right, and hence either no deductions for benefits are usually allowed, or only those which are of special benefit to the owner, but *where the property is taken solely for a public purpose, the public should be called upon to pay only the actual damages, after deducting all benefits, either special or general.*

Elks, 179 N.C. at 245, 102 S.E. at 416-17 (emphasis added).

I am aware that our sister states have enacted a wide variety of statutory schemes with regard to the measure of damages in condemnation cases, and that many of them do not provide for an offset for special and general benefits against property which remains after a taking. *See* 3 *Nichols on Eminent Domain*, § 8A.03, pp. 8A-26 to 8A-29. However, as our Supreme Court has consistently held, that decision is for

our legislature, not for this Court. "All the landowner can claim is that his property shall not be taken for public use without compensation. Compensation is had when the balance is struck between the damages and benefits conferred on him by the act complained of. To that, and that alone, he has a constitutional and vested right." *Miller*, 112 N.C. at 768, 16 S.E. at 764.

A statute is presumed to be constitutional, so one who challenges its constitutionality has the burden of establishing it. *State v. Johnson*, 124 N.C. App. 462, 474, 478 S.E.2d 16, 23 (1996), *cert. denied*, 345 N.C. 758, 485 S.E.2d 304 (1997). I agree with the trial court, which concluded after a hearing "that the defendants have failed to present sufficient evidence to support the constitutional issues raised and the relief requested."

III.

In their fourth Assignment of Error, defendants argue that the trial court erred in allowing the jury to consider the benefits to their property in determining damages. Although I find no constitutional infirmity in our statutory scheme for measuring damages in a Chapter 136 condemnation action, I also note that defendants did not object to the jury charge of the trial court relating to calculation of damages. Prior to submission of the case to the jury, the trial court held a charge conference and explained to counsel that it would be using section 835.12 of the Pattern Jury Instructions, "which is the eminent domain. partial taking by the DOT and I will include the benefit portion of that charge." Defendants did not object to the use of the pattern instruction, and asked only that the trial court use section 101.25 on expert witnesses, and section 101.30, dealing with interested witnesses.

The trial court then charged the jury, among other things, that in determining defendants' damages it might consider "any general or special benefits resulting from the utilization of the part [of the property] taken for public use." After completion

of the charge, the trial court asked counsel in the absence of the jury whether they had objections, changes, additions, or deletions to the charge. Counsel for the defendants answered that they did not. It appears that defendants cannot now assign error to any portion of the jury charge, particularly to those portions in which the trial court instructed the jury on the measure of damages. N.C.R. App. P. 10(2).

While I agree that the defendants are entitled to a new trial for reasons set out in our prior opinion in this case, and in Section I of the majority opinion, I dissent from that portion of the majority opinion which would declare N.C. Gen. Stat. § 136-112(1) unconstitutional for reasons not properly before us. In any event, we are not justified in declaring invalid this enactment of our legislature, its unconstitutionality not being "plainly and clearly the case." *Glenn v. Board of Education of Mitchell County, et. al.*, 210 N.C. 525, 187 S.E. 781 (1936).

Supreme Court, U.S.
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No. 01-819

In the

Supreme Court of the United States

JOE C. ROWE and wife, SHARON B. ROWE and HOWARD L. PRUITT, JR. and wife, GEORGIA PRUITT,

Petitioners,

v.

NORTH CAROLINA DEPARTMENT OF TRANSPORTATION,

Respondent.

On Petition for Writ of Certiorari to the Supreme Court of North Carolina

BRIEF IN OPPOSITION

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January 17, 2002

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N.C. Const., Art. I, § 19 1

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CITATIONS TO OPINIONS BELOW

The opinion of the North Carolina Supreme Court, reversing the opinion of the North Carolina Court of Appeals, is reported at 353 N.C. 671, 549 S.E.2d 203 (2001), and is included as Appendix A to the Petition. The opinion of the North Carolina Court of Appeals, including the dissent by Judge Horton, is reported at 138 N.C. App. 329, 531 S.E.2d 836 (2000), and is included as Appendix B to the Petition. Citations herein to those opinions below will be to the corresponding pages in the Appendices to the Petition.

JURISDICTION

The petitioners seek to invoke the jurisdiction of this Court, pursuant to 28 U.S.C. § 1257(a) to review a decision of the North Carolina Supreme Court. As explained below, respondent contends that petitioners have not established this Court's jurisdiction with regard to the specific question they seek to present.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

In addition to the pertinent portions of the Fifth and Fourteenth Amendments to the United States Constitution and Section 136-112(1) of the North Carolina General Statutes, Pet. at 1, Article 1, Section 19 of the North Carolina Constitution provides:

> No person shall be taken, imprisoned, or disseized of his freehold. liberties, or privileges, or outlawed, or exiled, or in any manner deprived of his life, liberty, or property, but by the law of the land. No person shall be denied the equal protection of the laws; nor shall any

person be subjected to discrimination by the State because of race, color, religion, or national origin.

STATEMENT OF THE CASE

Respondent agrees with petitioners that the facts of this case are relatively simple. However, the procedural history is not, and to the extent that history bears on the question of jurisdiction in this case, it must also be examined.

A. FACTUAL BACKGROUND

Respondent North Carolina Department of Transportation, pursuant to authority set forth in Chapter 136 of the North Carolina General Statutes, initiated this condemnation action in State superior court in Catawba County, North Carolina, to acquire a portion of petitioners' property for a public highway project. The project involved the construction of a new multi-lane highway and interchange to connect U.S. Highway 70/321 with Interstate 40, located less than one-half mile away. The acquisition consisted of 11.411 acres out of an 18.123 acre tract.

At the time of the acquisition, the subject property was undeveloped, except for a few billboards, and had no accessible frontage on any major highway, even though it was visible from and adjacent to Interstate 40. The tract was located behind a newly constructed K-Mart and, although the topography consisted primarily of rolling hills, a deep ravine near the boundary separated it from this adjacent development. The only access to the tract was by means of a dead-end city street which served a few homes and also provided a side entrance to K-Mart.

As a result of the project, the remainder of the subject property now has frontage on the new multi-lane connector to Interstate 40 and on a deeded right-of-way for a planned city

street which, when constructed, will join the connector at a signalized intersection.

B. PROCEDURAL HISTORY

1. Pleadings

In their Answer, Motions and Counterclaim ("Answer") filed in the trial court in response to the condemnation complaint, petitioners asserted that N.C.G.S. § 136-112 was unconstitutional because, to the extent it allowed consideration of *special and general* benefits, it denied them just compensation in violation of Article I, Section 19, of the Constitution of North Carolina ("law of the land" provision); and in violation of Amendment V ("just compensation" provision) and Amendment XIV ("equal protection" and "due process" provisions) to the United States Constitution. Pet. App. at B-23.

2. Issues Hearing

Pursuant to N.C.G.S. § 136-108, a pretrial hearing was held by the trial court to determine all issues other than the amount of just compensation due. In that hearing, their Answer notwithstanding, petitioners brought forth and argued only two bases for their constitutional challenge to N.C.G.S. § 136-112(1).

First, stating that their "constitutional attack on the benefits portion of Chapter 136 . . . is based very simply on this premise," *see* Pet. App. at B-24, they contended there was an equal protection violation because just compensation for partial takings of property in North Carolina could be calculated under two different statutory schemes: one applicable to takings by respondent for highway purposes (N.C.G.S. Chapter 136), and the other applicable in proceedings by private and local public condemnors (N.C.G.S. Chapter 40A). While the difference in fair market values of the subject property before and after the

taking is basic to the calculations under both provisions, the language of Chapter 40A makes no mention of benefits, special or general, but specifically provides that compensation is either the difference in the before and after values, or the fair market value of the part taken, whichever is greater. N.C.G.S. § 136-112(1) (2000); N.C.G.S. § 40A-64(b) (2000).

The only other argument advanced by petitioners at the hearing was that respondent had acted arbitrarily and capriciously in its dealings with them as compared to other nearby landowners on the project.

Contrary to petitioners' assertion in their petition, the trial court did not rule on the constitutional challenges raised in the Answer, but instead denied those specific challenges brought forth and argued at the issues hearing. In so doing the court concluded that petitioners had "failed to present sufficient evidence to support the constitutional issues raised and the relief requested." Pet. App. at B-31. Petitioners did not attempt to immediately appeal the trial court's denial of those constitutional challenges, but proceeded with the jury trial on the issue of just compensation.

3. At Trial

At trial, the jury heard testimony from respondent's experts that the remainder of petitioners' property was so enhanced in value, or benefitted by this project, which created new frontage and access for the tract, that the fair market value of the remaining property after the project exceeded the fair market value of the entire tract before the acquisition. While petitioners' experts agreed that part of the remainder was benefitted by the project, they concluded that the value of the remainder after the project was still considerably less than that of the entire tract before the project, and that compensation in a substantial amount was due petitioners.

The trial judge instructed the jury in accordance with N.C.G.S. § 136-112(1) which provides, in pertinent part:

> Where only a part of a tract is taken, the measure of damages for said taking shall be the difference between the fair market value of the entire tract immediately prior to said taking and the fair market value of the remainder immediately after said taking, with consideration being given to any special or general benefits resulting from the utilization of the part taken for highway purposes.

The sole issue submitted to the jury was the amount of money petitioners were entitled to recover from respondent as just compensation for the appropriation of a portion of their property for highway purposes. Apparently persuaded by respondent's evidence, the jury concluded that the value of petitioners' remaining property after the project was equal to or greater than the value of the entire tract before the acquisition and, accordingly, returned a verdict in the amount of zero compensation due. North Carolina law does not require a jury to specify whether it found the existence of special benefits, general benefits, or both in arriving at its verdict.

4. Appellate Proceedings

Following the jury trial below, petitioners gave notice of appeal to the North Carolina Court of Appeals. Among the errors assigned, only two related to constitutional questions and both of these raised equal protection claims. They were as follows:

> 3. The Trial Court's denial of Defendants' constitutional defenses on the grounds that G.S. 136-12(1)[sic] violates the equal protection provisions of the United States and North Carolina Constitutions.

> 4. The Trial Court's allowing the Jury to consider the benefit to Defendants' property in making its determination as to damages recoverable by the Defendants for the taking in that this violated Defendants' rights to equal protection under the United States and North Carolina Constitutions.

Pet. App. at B-24. Neither assignment of error implicated the Due Process Clause of the Fourteenth Amendment to the United States Constitution, or the "law of the land" (due process) provision of the North Carolina Constitution.

The North Carolina Court of Appeals initially denied review of these and certain other assignments of error on the procedural ground that a timely appeal had not been taken of the trial court's preliminary orders entered following the issues hearing. However, the court reversed the judgment of the trial court on an unrelated evidentiary error and remanded the case for a new trial. Pet. App. at B-1. Upon discretionary review of the timeliness of appeal issue, which was granted at petitioners' request, the North Carolina Supreme Court held that immediate appeal of the interlocutory orders was not required. The case was remanded to the Court of Appeals for consideration of those issues for which review had previously been denied, including the two specific assignments of error set forth above. Pet. App. at A-1-15

On remand, the North Carolina Court of Appeals, in a divided opinion, found N.C.G.S. § 136-112(1) to be unconstitutional on both due process and equal protection grounds, on its face and as applied to petitioners, to the extent that it allowed consideration of *general* benefits. Pet. App. at B-18-32. Judge Horton dissented and, on appeal, the Supreme Court of North Carolina reversed in a unanimous decision. Pet. App. at A-15.

The North Carolina Supreme Court first noted that it was under the "law of the land" clause (due process) and equal protection provisions of the *North Carolina* Constitution that the Court of Appeals had declared the general benefits provision of N.C.G.S. § 136-112(1) invalid. Pet. App. at A-2-3.

As to the lower court's holding that the statute denied just compensation (due process holding), the Supreme Court agreed with the dissent that no due process claim had been properly raised and preserved for review. The Court specifically noted that respondent had preserved no due process claim under the "law of the land" provision of the North Carolina Constitution, either by argument at trial, assignment of error on appeal, or argument before the Court of Appeals. Pet App. at A-4. Having held that no due process claim was properly before the lower court, and having cited the applicable State procedural rule that was violated, the North Carolina Supreme Court concluded, "[t]hus the Court of Appeals erred in considering the constitutionality of the statute on those grounds, and we disavow their reasoning and reverse their holding." Pet. App. at A-4.

The Court also agreed with Judge Horton that the only constitutional issue properly before the Court of Appeals was petitioners' equal protection claim based on the two different statutory schemes for determining just compensation in partial takings cases under North Carolina law. One of those schemes (N.C.G.S. § 136-112(1)) is applicable to takings by respondent for highway purposes, and the other is applicable in proceedings by private and local public condemnors (N.C.G.S. Chapter 40A).

The North Carolina Supreme Court further agreed with the dissent that N.C.G.S. § 136-112(1) does not violate the equal protection clause of the North Carolina Constitution. Pet. App. at A-3-4. The Court held that N.C.G.S. § 136-112(1) does "not trigger strict scrutiny because it neither classifies on

the basis of a suspect classification nor infringes upon a fundamental right. Furthermore, N.C.G.S. § 136-112(1) satisfies rational-basis scrutiny because there are rational reasons for DOT [respondent] and other condemnors to use different systems to calculate just compensation." Pet. App. at A-5-6. Therefore, the Supreme Court reversed the holding of the Court of Appeals on the equal protection issue as well. Pet. App. at A-15.

From this North Carolina Supreme Court decision, petitioners filed their Petition for Writ of Certiorari.

REASONS WHY THE WRIT SHOULD NOT BE GRANTED

The decision of the North Carolina Supreme Court concluded that N.C.G.S. § 136-112(1) was a valid exercise of the legislative power of the North Carolina General Assembly and that if did not violate the Equal Protection Clause of either the United States Constitution or the North Carolina Constitution. Petitioners now ask this Court to consider whether the statute violates the Fifth Amendment to the United States Constitution, an issue which was explicitly stricken from consideration by the North Carolina Supreme Court as not having been properly preserved for review in accordance with State law. Consideration of a constitutional challenge to a state law raised for the first time in a Petition for Certiorari and never addressed or decided by the highest court of the state would be contrary to both the jurisdictional parameters of 28 U.S.C. § 1257(a) and longstanding precedent of this Court.

Nor is the decision of the North Carolina Supreme Court in conflict with decisions of this Court or of significant constitutional importance. Relying on clear precedent, the North Carolina Supreme Court simply concluded that the State's statutory scheme for determining just compensation in highway condemnation cases, including allowing finders of fact to consider general benefits to remaining property, is

constitutionally sound. The fact that various states have elected to establish differing formulas for compensating property owners where property has been taken for public use does not justify the exercise of this Court's jurisdiction. Having concluded that permitting consideration of general benefits does not violate any fundamental right guaranteed to a property owner by the Fourteenth Amendment, this Court has left to the states the legal and policy decisions surrounding a methodology of providing the measure of just compensation necessary to meet State constitutional requirements. The decision of the North Carolina Supreme Court approving the methodology adopted by the North Carolina General Assembly merits no further review by this Court.

I. THIS COURT HAS NO JURISDICTION IN THIS CASE UNDER 28 U.S.C. § 1257(a).

The petitioners contend that the North Carolina Supreme Court, in the context of this State highway condemnation case, has erroneously decided an important federal question, to wit: whether, in awarding just compensation for the taking of a partial tract of property, the Fifth Amendment allows a court to reduce (offset) the award by the value of the general benefits said to accrue to the remainder of the tract as a result of the taking. Pet. at 1. This question however, was neither considered nor decided by that court, and should therefore not be reviewed by this Court.

The Fifth Amendment right to just compensation in condemnation cases is made applicable to the states through the Due Process Clause of the Fourteenth Amendment. *Chicago, Burlington & Quincy R.R. Co. v. City of Chicago,* 166 U.S. 226, 239 (1897). In North Carolina, the rule governing the calculation of just compensation in highway condemnation cases, where only part of a tract is appropriated, as here, is codified in N.C.G.S. § 136-112(1). It allows the finder of fact (the jury) to consider any special or general benefits resulting from the utilization of the part taken for highway purposes.

Consequently, the question which petitioners are seeking to present is, in reality, whether N.C.G.S. § 136-112(1) is unconstitutional on its face because it allows consideration of general benefits. In the context of the facts of this case, this is clearly an attack on due process grounds, and the North Carolina Supreme Court declined to decide that question. Petitioners are thus seeking to present a due process question here that was not decided by the highest court of the State.

A. PETITIONERS HAVE FAILED TO PROPERLY INVOKE THIS COURT'S JURISDICTION UNDER 28 U.S.C. § 1257(a) BY FAILING TO PRESERVE THE QUESTION PRESENTED FOR REVIEW.

This Court has long held that a party seeking to invoke jurisdiction under 28 U.S.C. § 1257(a) first must present the federal question for decision to the highest court of the State having jurisdiction. Further, that court's decision of the federal question must be necessary to the determination of the issue, and the court must actually decide the issue on a judgment which, as rendered, could not have been given without deciding it. *See Mellon v. O'Neil*, 275 U.S. 212, 214 (1927); *Lynch v. New York*, 293 U.S. 52 (1934). A challenge to a state statute as repugnant to the federal constitution, as here, must be explicit and timely. *See Raley v. Ohio*, 360 U.S. 423 (1959); *Rohr Aircraft Corp. v. County of San Diego*, 362 U.S. 628 (1960). The federal right or federal question first must be raised in the trial court, whenever, under State law, the State's highest court refuses to consider questions not previously raised. *State v. King*, 342 N.C. 357, 364, 464 S.E.2d 288, 293 (1995); *See also, Mutual Life Ins. Co. v. McGrew*, 188 U.S. 291 (1903); *Spies v. Illinois*, 123 U.S. 131 (1887).

Petitioners are correct that a general constitutional challenge to the statutory language of N.C.G.S. § 136-112(1)

was raised as a defense in their Answer. Pet. at 3. However, petitioners are incorrect in their assertion "[t]hat the trial court rejected this federal constitutional challenge." Pet. at 3. At the hearing before the trial court, petitioners abandoned their defense that the statute was unconstitutional on its face and should "be declared null and void." Rather, the sole defense argued was that the statute was unconstitutional because petitioners were treated differently under N.C.G.S. § 136-112(1) than condemnees under N.C.G.S. § 40A-64(b), and thus were deprived of equal protection of the law. Pet. App. at B-23-24. Therefore, petitioners abandoned the due process violation alleged in their Answer and pursued only the equal protection argument before the trial court.

Likewise, on appeal to the Court of Appeals, among the errors assigned, only two related to constitutional questions, and neither implicated the Due Process Clause of the Fourteenth Amendment to the United States Constitution, or the "law of the land" (due process) provision of the North Carolina Constitution. These two assignments of error raised only equal protection claims. Pet. App. at B-24. Thus, the only constitutional question properly before the North Carolina Court of Appeals and the North Carolina Supreme Court was whether the equal protection provisions of the constitutions of the United States and the State of North Carolina are violated by the different damage schemes found in N.C.G.S. §§ 136-112(1) and 40A-64(b). Pet. App. at A-3; B-25. This is clearly not the question which petitioners now ask this Court to review. Pet. at i.

This Court has consistently held that federal questions which were not raised in the trial court and pursued by appeal in accordance with the state's rules of practice and procedure cannot provide the basis for jurisdiction if the state's appellate court refuses to consider the federal question for failure to timely raise it. *See Louisville & N.R. Co. v. Woodford*, 234 U.S. 46 (1914); *Hartford Life Ins. Co. v. Johnson*, 249 U.S. 490 (1919).

The North Carolina Rules of Appellate Procedure provide, in pertinent part,

> [i]n order to preserve a question for appellate review, a party must have presented to the trial court a timely request . . . stating the specific grounds for the ruling the party desired the court to make . . . . It is also necessary for the complaining party to obtain a ruling upon the party's request.

N.C.R. APP. P. 10(b)(1)(2002).

The North Carolina Supreme Court ruled that because petitioners did not argue a due process claim before the trial court and did not raise the issue as an assignment of error on appeal, they had not complied with the requirements of North Carolina Rule of Appellate Procedure 10(b). No due process claim was properly preserved and, therefore, none was properly before the appellate courts. Pet. App. at A-3-4.

Petitioners, having failed to properly pursue and argue the alleged due process of law violation applicable through the "law of the land" clause of the North Carolina Constitution and the Fourteenth Amendment to the United States Constitution, cannot now raise that issue in this Court by challenging the validity of the statute on its face. *See State v. Grundler*, 251 N.C. 177, 111 S.E.2d 1 (1959), *cert. denied*, 362 U.S. 917 (1960); *Edelman v. California*, 344 U.S. 357 (1953); *Louisville & N.R. Co. v. Woodford*, 234 U.S. 46 (1914).

B. THE DUE PROCESS QUESTION PRESENTED WAS NOT A FINAL DECISION BY THE HIGHEST COURT OF THE STATE.

In order to properly invoke this Court's jurisdiction under 28 U.S.C. § 1257(a), petitioners must also present a question resulting from a final decision of the state's highest appellate court. The North Carolina Court of Appeals held that the general benefits provision of N.C.G.S. § 136-112(1), on its face and as applied, violates the constitutional requirement of just compensation. Pet. App. at B-18. As noted above, the North Carolina Supreme Court held that this due process question had not been preserved and reversed the Court of Appeals, holding that the court had erroneously decided a constitutional question on grounds that were not properly before it. Pet. App. at A-4. The North Carolina Supreme Court therefore neither addressed nor decided the merits of the due process issue which petitioners now ask this Court to review. This Court has clearly stated that "we do not decide in the first instance issues not decided below." *National Collegiate Athletic Ass'n v. Smith*, 525 U.S. 459, 470 (1999).

II. PETITIONERS HAVE FAILED TO DEMONSTRATE A COMPELLING REASON WHY THE WRIT SHOULD BE GRANTED.

Review by writ of certiorari will be granted only for compelling reasons. SUP. CT. R. 10 (2001). Under the predecessor to Rule 10, a federal question raised by a petitioner may be "of substance" in the sense that, abstractly considered, it may present an intellectually interesting and solid problem. But this Court does not sit to satisfy a scholarly interest in such issues. Nor does it sit for the benefit of the particular litigants. *Magnum Import Co. v. Coty*, 262 U.S. 159, 163 (1923). The phrase "special and important reasons" implies a reach to a problem beyond the academic or the episodic. This is

especially true where the issues involved reach constitutional dimensions, for then there comes into play regard for this Court's long practice of avoiding decision of constitutional issues unless avoidance becomes evasion. *Ashwander v. Tennessee Valley Authority*, 297 U.S. 288, 341 (1936).

A. THE QUESTION DECIDED BY THE NORTH CAROLINA SUPREME COURT IS NOT ONE OF SUCH RECURRING CONSTITUTIONAL SIGNIFICANCE AS TO MERIT REVIEW BY THIS COURT.

Contrary to petitioners' assertions, there is nothing to suggest that the long standing difference among the states and the federal courts on the question of allowing consideration of general benefits in calculating just compensation is of such significance to constitutional jurisprudence or suddenly of such moment to now demand resolution. Petitioners admit that "the rules about which benefits may be set off against the value of the land taken are usually of ancient vintage" Pet. at 10, and "the 'basic theory' of just compensation has not changed for at least a century" Pet. at 16. Both statements fly in the face of the implication that the North Carolina decision creates or exposes a sharp conflict in constitutional law that must now be resolved.

In fact, for more than one hundred years this Court has recognized that most states and the federal courts do not allow general benefits as an offset; that some states allow general benefits to offset damages to the remainder, but not the value of the land taken; and, that still others, like North Carolina, allow general benefits to offset both. *See Bauman v. Ross*, 167 U.S. 548 (1897) and *McCoy v. Union Elevated Railroad Co.*, 247 U.S. 354 (1918) and the cases cited therein.

Despite this obvious difference in rules, this Court has never sought to impose one uniform rule regarding the type of benefits that can be considered on the states for two reasons. First, the difference between general and special benefits in the context of just compensation has never been held to be of constitutional significance. This is so because "it is the duty of the State to see that compensation is just, not merely to the individual whose property is taken, but to the public which is to pay for it." *Searl v. Lake County Sch. Dist.*, 133 U.S. 553, 562 (1890). The just compensation required by the Constitution is to be measured by the loss *in value* to the owner, "[t]o award him less would be unjust to him; to award him more would be unjust to the public." *Bauman,* 167 U.S. at 574. "He must be made whole, but is entitled to no more." *Olson v. United States*, 292 U.S. 246, 255 (1934). It is well established that the Fifth Amendment permits the value of land acquired to be fully offset by benefits to the remainder resulting from the highway project, because the owner has sustained no net loss in *value*. *Bauman,* 167 U.S. at 584. If the enhancement in value (benefit) of the remainder is real, not speculative, and is the proximate result of the project, then the owner is made whole even though the benefit is set off against the value of the part of his property that is acquired to build the highway, and the Constitution satisfied. North Carolina law requires that to be considered, benefits "must be actual and appreciable and not merely conjectural and they must be the direct and proximate result of the improvement." *Kirkman v. State Highway Comm'n*, 257 N.C. 428, 434, 126 S.E.2d 107, 112 (1962).

Second, even though most states and the federal courts may believe that it is the *better* rule to allow special but not general benefits as a setoff, that is not the standard this Court applies when the constitutionality of a state's rule is challenged. As was stated in *McCoy*:

> We may examine proceedings in state courts for appropriation of private property to

> public purposes so far as to inquire whether a rule of law was adopted in absolute disregard of the owner's right to just compensation. If the necessary result was to deprive him of property without just compensation, then due process of law was denied him, contrary to the Fourteenth Amendment. *Our concern is not to ascertain whether the rule adopted by the State is the one best supported by reason or authority . . . but with denial of a fundamental right.*

247 U.S. at 363 (citations omitted and emphasis added).

The fundamental right to just compensation is not denied when benefits are considered, no matter if they are dubbed general or special, so long as the condemnee is made whole.

By its decision below, the North Carolina Supreme Court has affirmed that the State of North Carolina, through the enactment of N.C.G.S. § 136-112(1) which allows consideration of general benefits, has struck a proper and constitutional balance between fairness to the property owner and fairness to the public, and affords a compensation that is just to the condemnee because it makes him whole in terms of value. Pet. App. at A-10-11.

Petitioners suggest that allowing consideration of general benefits *often* transforms the constitutional guarantee of just compensation into a rule of no compensation. Pet. at 10. In support of this statement they cite only two cases, both decided more than forty-five years ago. To the contrary, it is the experience of respondent, gained over the course of thousands of highway condemnation cases in this State, that verdicts of zero compensation are extremely rare, and respondent virtually never offers evidence of what would be properly characterized as general rather than special benefits in those proceedings.

In fact, it is the uniqueness of the facts in petitioners' case, not the rules applied, that explains their fate in the trial court. That rare fact situation also explains why their constitutional challenge to the general benefits provision, which has been intact for over one hundred years, was one of first impression in the North Carolina Supreme Court. Pet. App. at A-9. It is extremely rare that remainder property is so clearly specially and directly benefitted by a highway project as here, where the property formerly had no frontage on any major highways, but now the remainder has significant frontage and access on a new, multi-lane connector to a new interstate highway interchange and on a deeded right-of-way for a planned city street which will eventually join the connector at a signalized intersection.

The essence of petitioners' equal protection argument below was only marginally premised upon a distinction between general and special benefits. Petitioners' actual grievance was that under the statute applicable to private condemnors, N.C.G.S. § 40A-64(b), they would have at least received the value of the land acquired; whereas, under N.C.G.S. § 136-112(1) consideration of benefits resulted in the zero verdict. While petitioner may disagree with the policies underlying this method of just compensation, North Carolina's decision to adopt and consistently apply this statutory scheme, as sanctioned by the highest court of the State does not raise issues of federal constitutional significance justifying review by this Court.

B. THE DECISION OF THE NORTH CAROLINA SUPREME COURT IS NOT IN CONFLICT WITH THE DECISIONS OF THIS COURT.

Two time-tested decisions of this Court are especially pertinent to this issue, not only for what they hold, but also for what they do not hold.

In *Bauman*, this Court examined the various rules adopted by the states regarding the offset of benefits, including those which allow the offset of general benefits, and held:

> The Constitution of the United States contains no express prohibition against considering benefits in estimating the just compensation to be paid for private property taken for the public use; and, for the reasons and upon the authorities above stated, no such prohibition can be implied.

167 U.S. at 584.

Nowhere in *Bauman*, or in any decision of this Court thereafter, is it stated or remotely suggested that the Fifth Amendment right to just compensation precludes the states from allowing the offset of general benefits, or that the rule that was being adopted in that case regarding benefits (the federal rule) was intended to establish the *minimum* level of compensation that was constitutionally acceptable.

In *McCoy*, this Court again examined the benefits rules in the various jurisdictions which are applicable both where property is taken, and where it is damaged but not taken. The plaintiff there claimed he had been deprived of the value of his property without just compensation in violation of the Fourteenth Amendment where state law allowed general benefits to offset the compensation he would have otherwise received as a result of the construction of an elevated railway adjacent to his property. The Court held:

> The fundamental right guaranteed by the Fourteenth Amendment is that the owner shall not be deprived of the value of his property under a rule which makes it impossible for him to obtain just compensation. There is no guarantee that he shall derive a positive

> pecuniary advantage from a public work whenever a neighbor does. It is almost universally held that in arriving at the amount of damage to property not taken allowance should be made for peculiar and individual benefits conferred upon it – compensation to the owner in that form is permissible. *And we are unable to say that he suffers deprivation of any fundamental right when a state goes one step further and permits consideration of actual benefits -- enhancement in market value -- flowing directly from a public work, although all in the neighborhood receive like advantages.* In such case the owner really loses nothing which he had before; and it may be said with reason, there has been no real injury.

247 U.S. at 365-66 (emphasis added).

The North Carolina Supreme Court cited the italicized portion of the holding in *McCoy* in its decision below in support of the proposition that the Fourteenth Amendment "allows states to empower fact-finders to consider 'general benefits' when calculating just compensation." Pet. App. at A-8. Other states are in accord with this interpretation of *McCoy*. *See McRea v. Marion County*, 133 So. 278, 279 (Ala. 1931); *Los Angeles County Metro. Trans. Auth. v. Continental Dev. Corp.*, 941 P.2d 809, 822 (Cal. 1997). Petitioners contend this is an erroneous application of federal law. They strain to distinguish *McCoy*, contending that because it involved property that was damaged but not taken. The holding has no application where property is actually taken.

In *McCoy*, although it was the *value* of the property that had been taken, this Court applied the same Fourteenth Amendment analysis applicable to a case where property had been taken, citing the same rules in the various states regarding offset of benefits. The same due process right to just

compensation where property is taken was involved. While the Court noted that no property had been taken, there is no suggestion in the opinion that a different rule would apply if an actual loss of property had been involved. Further, the Court noted that the subject was much discussed in *Bauman* and quoted extensively from the holding in that case, including the proclamation that the Fifth Amendment does not prohibit the offset of benefits. Therefore, this Court clearly treated and analyzed *McCoy* as a takings case. The North Carolina Supreme Court thus properly applied *McCoy* in concluding that neither the Fifth nor the Fourteenth Amendment to the United States Constitution precludes a state from allowing fact-finders to consider general benefits when calculating just compensation.

III. SUMMARY REVERSAL IS AN EXTRAORDINARY REMEDY NOT WARRANTED IN THIS CASE.

Summary reversal is clearly not warranted here. Usage and practice suggest that this extraordinary remedy be employed only in the most unusual case. In order for it to be available, the law must be settled and stable, the facts not in dispute, and the decision below clearly in error. *Schweiker v. Hansen*, 450 U.S. 785, 791 (1981). Here, petitioners' own arguments make it clear that the law is not settled among the various jurisdictions regarding the offset of general benefits. For the reasons stated above, even if the North Carolina Supreme Court misapplied *McCoy*, which it did not, the result is that the constitutional issue is not settled because petitioners cannot point to a decision of this Court which clearly prohibits the states from setting off general benefits without constitutional peril. Therefore, petitioner cannot establish that the North Carolina Supreme Court's decision was clearly in error or that summary reversal is warranted.

CONCLUSION

For the reasons discussed above, petitioners have failed to identify any issue worthy of this Court's consideration on certiorari. Accordingly, respondent respectfully requests that this Court deny the Petition for Writ of Certiorari.

Respectfully submitted,

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Supreme Court, U.S.
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No. 01-819

In the

Supreme Court of the United States

JOE C. ROWE and wife, SHARON B. ROWE, and HOWARD L. PRUITT, JR. and wife, GEORGIA PRUITT,

Petitioners,

v.

NORTH CAROLINA DEPARTMENT OF TRANSPORTATION,

Respondent.

On Petition for Writ of Certiorari to the Supreme Court of North Carolina

REPLY TO OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether, in awarding just compensation for the taking of a partial tract of property, the Fifth Amendment allows a court to reduce the award by the value of the *general* benefits said to accrue to the remainder of the tract as a result of the taking.

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REPLY TO OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Petitioners Joe C. Rowe, Sharon B. Rowe, Howard L. Pruitt, Jr., and Georgia Pruitt respectfully file this reply to respondent's Brief in Opposition (Opp.).

ARGUMENT

The petition showed how, in giving an affirmative answer to the question presented, the North Carolina Supreme Court issued a demonstrably erroneous ruling in conflict with numerous state and federal courts, including this Court. Respondent argues that the Court lacks jurisdiction to resolve the conflict and that there is in any event no compelling reason to grant the petition. As set forth below, respondent errs on both counts.

I

THIS COURT UNQUESTIONABLY HAS JURISDICTION

Respondent asserts first that this Court lacks jurisdiction because the question presented "was neither considered nor decided by" the North Carolina Supreme Court. Opp. at 9. This assertion is completely and unequivocally false, and this Court unquestionably has jurisdiction under 28 U.S.C. § 1257(a).

The state supreme court decided two issues, conveniently addressed in Part I and Part II of its opinion, respectively. The first involved the North Carolina analogue to the federal Due Process Clause: "We first conclude that the Court of Appeals erred because the question of whether [North Carolina General Statutes § 136-112(1)] violates the Law of the Land Clause was not properly presented." Petition Appendix (Pet. App.) at A–3 (discussing North Carolina Rule of Appellate Procedure 10(c) and other state-law authorities). *Petitioners do not challenge any aspect of that ruling.*

The second issue decided by the state's highest court involved state *and federal* equal protection guarantees: "We also agree with Judge Horton that [Section] 136-112(1) did not deprive defendants the equal protection of the law . . . ." *Id.* at A–4. Accordingly, "we reverse the Court of Appeals' holding that [the statute] violates the Equal Protection Clause of the North Carolina Constitution. We also hold that it comports with the United States Constitution." *Id.*

How did the state supreme court arrive at this rejection of petitioners' federal constitutional claim? At the risk of being pedantic, but impelled by respondent's jurisdictional argument, we recount the court's reasoning in detail:

1. "In concluding that defendants were denied equal protection under [Section] 136-112(1), the Court of Appeals applied strict scrutiny. We conclude that it was error to do so. In fact, as explained below, [the statute] does not trigger strict scrutiny because it neither classifies on the basis of a suspect classification nor infringes upon a fundamental right." Pet. App. at A–5 (citation omitted).

2. "[Petitioners] argue that the Court of Appeals correctly concluded that [Section] 136-112(1) infringes upon a fundamental right. They claim that the statute violates their right to just compensation." *Id.* at A–6.

3. "Just compensation is clearly a fundamental right under both the United States and North Carolina Constitution. It is specifically enumerated in the Fifth Amendment to the United States Constitution and has been applied to the states through the 14th." *Id.* (citing *Chicago, Burlington & Quincy Railroad Co. v. City of Chicago*, 166 U.S. 226, 239 (1897)).

4. "Since a fundamental right is involved, we must determine [whether] that right is infringed upon by application of [Section] 136-112(1). If [petitioners'] right to just compensation is impacted by the statute, then that impact would warrant

a review under the strict-scrutiny standard. If there is no infringement, then the rational-basis standard would apply." *Id.* at A–7.

5. "The Court of Appeals held that [petitioners] did not receive just compensation because the statute allows the jury to consider 'general benefits' when it calculates just compensation for a partial taking. *Id.* In other words, "[b]ecause this statute allows a jury to consider 'general benefits,' the Court of Appeals held that it 'allows a compensation which is unjust to the condemnee.'" *Id.* at A–8 (quoting Pet. App. at B–18).

6. "We disagree. The Fifth Amendment to the United States Constitution clearly allows Congress to empower the fact-finder to consider 'general benefits.' *McCoy v. Union Elevated R.R. Co.*, 247 U.S. 354, 366 . . . (1918)." *Id.* The states share this power with Congress: "It is clear that the Fourteenth Amendment to the United States Constitution allows states to empower fact-finders to consider 'general benefits' when calculating just compensation. The United States Supreme Court stated in *McCoy v. Union Elevated R.R. Co.* that . . . ." *Id.*[1]

What does this recounting demonstrate? It demonstrates that petitioners advanced a *federal constitutional* claim, in support of which they made a *federal constitutional* argument, and that the Supreme Court of North Carolina rejected that claim, issuing a *federal constitutional* ruling grounded in the *federal constitutional* decisions of this Court. And precisely what was

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[1] Once the lower court concluded that Section 136-112(1) satisfied the requirements of the Just Compensation Clause as applied to the states (and, as no one disputed, that the statute employed no suspect classification), the court applied "rational-basis scrutiny." Pet. App. at A–12. Like virtually all statutes, Section 136-112(1) passed that test handily. *See id.* at A–12 to –14. If this Court grants the petition and reverses, the state supreme court will, by its own admission, be compelled to apply strict scrutiny instead. *See id.* at A–7. Under any view of the law, that change is potentially dispositive.

that ruling? It was that the Just Compensation Clause of the Fifth Amendment to the United States Constitution, as applied to the states through the Fourteenth Amendment, "allows states to empower fact-finders to consider 'general benefits' when calculating just compensation." *Id.* Rephrased as a question and revamped slightly for clarity, this interpretation of the Just Compensation Clause is precisely what petitioners have presented to this Court for decision.[2]

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[2] Although the discussion in the text more than suffices to establish this Court's jurisdiction to entertain the petition, petitioners note for good measure that the jurisdictional decisions cited by respondent, *see* Opp. at 10, are obviously inapposite. For example, in *Mellon v. O'Neil*, 275 U.S. 212, 214 (1927), the only assignment of error that conceivably conferred jurisdiction on this Court was that "provisions of the New York Civil Practice Act, relating to the amendment of process and substitution of parties, . . . are invalid because of repugnancy to the laws of the United States." The Court, however, dismissed the appeal for want of jurisdiction, because the record did "not show that this question was either presented to or passed upon by the Appellate Division. *No reference to the Practice Act or challenge to its validity appears in the proceedings either at Trial Term or in the Appellate Division.*" *Id.* (emphasis added). In the opinion below, by contrast, there are numerous references to the challenged state statute—namely, Section 136-112(1)—and to its validity vel non on federal constitutional grounds.

For another example, in *Lynch v. New York ex rel. Pierson*, 293 U.S. 52 (1934), a taxpayer challenged a state tax determination in the New York courts on both federal and state constitutional grounds. In awarding him relief, the intermediate appellate court, "while citing decisions of this Court under the Fourteenth Amendment, did not state that its decision rested upon the application of the Constitution of the United States"; the state's highest court affirmed, "but without opinion, and the grounds of its decision are left to conjecture." *Id.* at 54 (citation omitted). In dismissing the writ of certiorari as improvidently granted because it could not be determined whether the decision below rested on federal grounds, this Court explained that

(continued...)

Therefore, respondent simply is flat-out wrong to assert that the question presented "was neither considered nor decided by" the state supreme court. Opp. at 9. To the contrary, "the validity of a statute of [North Carolina was] drawn in question on the ground of its being repugnant to the Constitution . . . of the United States," 28 U.S.C. § 1257(a), and the court below sustained the statute on the ground that, in awarding just compensation for the taking of a partial tract of property, the Fifth Amendment allows a court to reduce the award by the value of the *general* benefits said to accrue to the remainder of the tract as a result of the taking. The Court unquestionably has jurisdiction to review that interpretation of the federal Constitution.

II

THE QUESTION PRESENTED CLEARLY MEETS THE STANDARDS OF RULE 10

Following its meritless jurisdictional argument, respondent attempts to show that there is no "compelling reason" why the petition should be granted. Opp. at 13. As set forth below, that attempt is not well taken.[3]

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[2] (...continued)
"jurisdiction cannot be founded upon surmise. Nor can [a] claim of jurisdiction be sustained by reference to briefs and statements which are not part of the record." *Id.* Here, there is no surmise about the basis for the decision below. The Supreme Court of North Carolina explicitly invoked the United States Constitution and explicitly ruled that it permitted the state to do just what petitioners argued was prohibited by that same Constitution.

[3] As an initial matter, we can dismiss respondent's reliance on the oft-cited dictum of Justice Brandeis that "[c]onsiderations of propriety, as well as long-established practice, demand that we refrain from passing upon the constitutionality of an act of Congress unless obliged to do so in the proper performance of our judicial function, when the question is raised by a party whose interests entitle him to (continued...)

A. Respondent Offers No Credible Reason for Discounting or Ignoring the Acknowledged Split in the Lower Courts

The petition carefully demonstrated that "the decision of the Supreme Court of North Carolina conflicts with numerous decisions of state and federal appellate courts." Pet. at 4. What does respondent have to say in opposition? In a word, nothing. In fact, *respondent agrees with petitioners*, candidly conceding the existence of a "long standing difference among the states and the federal courts on the question of allowing consideration of general benefits in calculating just compensation." Opp. at 14. In other words, by respondent's own admission, "a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals." Rule 10(b).

Besides acknowledging its existence, what *does* respondent say about this conflict? Putting aside for a moment the correctness of the decision below, respondent makes basically two arguments. First, that the acknowledged conflict is not sufficiently "recurring" to warrant resolution at this time, Opp. at 14; i.e., the conflict is "academic" or "episodic," Opp. at 13. The principal support for this point is, incredibly, petitioners' own statements. But in declaring that "[p]etitioners admit that 'the rules about which benefits may be set off against the value

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[3] (...continued)
raise it." *Ashwander v. Tennessee Valley Authority*, 297 U.S. 288, 341 (1936) (concurring opinion), *cited in* Opp. at 14. First of all, the constitutional question here *is* raised by parties whose interests entitle them to raise it. More fundamentally, it is incredible to imagine that the Court exercises its certiorari jurisdiction for the purpose of *avoiding* constitutional questions. Instead, one of the storied purposes of the Court's jurisdiction, particularly in cases like this one where state courts are split on issues of federal constitutional law, is to *answer* those questions. *See, e.g., Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 347-48 (1816).

of the land taken are usually of ancient vintage,' " Opp. at 14 (quoting Pet. at 10), respondent conveniently omits—and thus tellingly admits—petitioners' point that these setoff rules "are applied frequently to this day"—a synonym for *recurring* and an antonym for *episodic*. Pet. at 10 (citing, as exemplary, two decisions issued in 2001 and one the year prior). Moreover, in repeating petitioners' statement that "the 'basic theory' of just compensation has not changed for at least a century," Opp. at 14 (quoting Pet. at 16), respondent merely highlights just how sharply the decision below diverges from the long standing decisions of the federal courts and most state courts.

Respondent's second argument for this Court's ignoring the "long standing difference among the states and the federal courts on the question" presented, Opp. at 14, is the supposed "uniqueness" of petitioners' situation, Opp. at 17. But while chiding petitioners for citing only *two* cases (in addition to this one) that exemplify how the "consideration of general benefits *often* transforms the constitutional guarantee of just compensation into a rule of no compensation," respondent cites *neither a single case nor any other authority* for its bald assertion that "verdicts of zero compensation are extremely rare" in partial takings cases like this one. Opp. at 16. Respondent also asks the Court to believe that even though it is explicitly authorized by statute to do so, even though it did so in this case, and even though the North Carolina Supreme Court gave its blessing to the practice, respondent "virtually never" offers evidence of *general* benefits in partial takings cases. *Id.* But respondent's naked promise to "trust me" is not a legitimate reason to deny the petition.

B. Respondent Offers No Credible Reason to Think That the Acknowledged "Federal Rule" Against Consideration of General Benefits Is Anything Other than a Constitutional Rule

This brings us to the merits of the state supreme court's ruling. In addition to demonstrating a conflict between the de-

cision below and the decisions of numerous state courts of last resort and federal courts of appeals, petitioners demonstrated that the state supreme court had "decided an important federal question in a way that conflicts with relevant decisions of this Court." Rule 10(c). Indeed, petitioners argued that the ruling below was such a "demonstrably erroneous application of federal law," *Maryland v. Dyson*, 527 U.S. 465, 467 n.1 (1999), as to warrant summary reversal. *See* Pet. at 11-18.

Respondent does not deny that rule adopted by the North Carolina Supreme Court in the present case conflicts with the rule adopted by this Court in *Bauman v. Ross*, 167 U.S. 548, 574 (1897). *See id.* (holding that in partial takings cases, when "the part which [the owner] retains is *specially and directly* increased in value by the public improvement, the damages to the whole parcel by the appropriation of part of it are lessened" by the increase (emphasis added)). Instead, respondent argues that no authority suggests that "the rule that was being adopted in [*Bauman*] regarding benefits (the federal rule) was intended to establish the *minimum* level of compensation that was constitutionally acceptable." Opp. at 18. Indeed, in respondent's view, several cases hold otherwise. *See* Opp. at 18-19. These arguments are mistaken.

First, what the cases actually hold is that "the Supreme Court of the United States and a majority of other jurisdictions have held that only special benefits may be *constitutionally* set-off." 3 Julius L. Sackman et al., *Nichols on Eminent Domain* § 8A.02[6] (rev. 3d ed. 2001) (footnote omitted and emphasis added). Prior to *Bauman v. Ross*, the Court held that under the Constitution, "compensation must be a full and perfect equivalent for the property taken." *Monongahela Navigation Co. v. United States*, 148 U.S. 312, 326 (1893). "This excludes," added the Court, "the taking into account, as an element in the compensation, any supposed benefit that the owner may receive *in common with all* from the public uses to which his private property is appropriated," i.e., general benefits. *Id.* (emphasis

added). *Cf. Brand v. Union Elevated Railroad Co.*, 238 U.S. 586, 597 (1915) (Day, J., dissenting) (although the majority did not reach the issue, four Justices cited *Monongahela* as holding that "just compensation, *in the constitutional sense*, excludes taking into account the supposed benefits that the owner may receive in common with the public" (emphasis added)).

The federal courts of appeals have also acknowledged the constitutional basis of the rule against consideration of general benefits. In *Aaronson v. United States*, 79 F.2d 139, 140 (D.C. Cir. 1935), the court opined that the federal rule of *Bauman v. Ross* "grows out of the command of the Constitution (Amendment 5)." The court explained that in the absence of "express words" in the governing statute granting a more generous rule of compensation, an expropriated property owner is entitled to receive precisely what "the Constitution requires"—no more and (of course) no less. *Id.* And what is that? It is precisely what is laid out in *Bauman*, namely, "consideration of damages on the one hand and [special] benefits on the other." *Id.*; *see also id.* ("The court below rightly told the jury that only special benefits should be considered . . . ."). More recent decisions are in accord with this understanding. *See, e.g., Van Buren v. United States*, 697 F.2d 1058, 1062 (Fed. Cir. 1983) (opining that "only benefits inuring specifically to the condemnee, rather than to the community at large, are relevant to an analysis of the government's liability under the Fifth Amendment"); *Caponi v. Carlson*, 392 N.W.2d 591, 596 (Minn. Ct. App. 1986) (applying the rule against consideration of general benefits in a case where the government "took Caponi's property without compensation in violation of U.S. Const. amend. V").

Second, respondent asserts that *McCoy v. Union Elevated Railroad Co.*, 247 U.S. 354, 366 (1918), espouses a contrary rule. Petitioners have already explained at length why that is not so. *See* Pet. at 12-13. As respondent acknowledges, "no property had been taken" in that case, Opp. at 20, so there was no occasion to apply a rule governing compensation for partial

takings of property. The other two cases cited by respondent, *see* Opp. at 19, are likewise distinguishable. Both *McRea v. Marion County*, 133 So. 278, 279 (Ala. 1931), and *Los Angeles County Metropolitan Transportation Authority v. Continental Development Corp.*, 941 P.2d 809, 822 (Cal. 1997), involved the issue of "damages" for property *not* taken, a situation that has no application to the present case. Both relied on *McCoy* only in that confined context.

In the end, all respondent has to offer on the merits is a strained, out-of-context reading of a single sentence in a single decision of this Court. Arrayed against this meager offering are the uniform decisions of both this Court and the federal courts of appeals, together with the decisions of the vast majority of state courts. In these circumstances, it can fairly be said that the North Carolina Supreme Court applied the Just Compensation Clause in a demonstrably erroneous fashion. Whether the appropriate response by this Court is summary reversal or plenary review, it is clear that a grant of certiorari is warranted.

CONCLUSION

The petition for writ of certiorari should be granted.

DATED: January, 2002.

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